Supreme Court, U.S.
FILED

No. 06-87 JUL 1 9 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GREG ALAN MORGAN,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals erred in concluding that this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962) grants district courts' discretion to deny an amendment asserted under the first sentence of Fed.R.Civ.P. 15(a)? (Second Appeal).

Whether the court of appeals erred in holding that "military bases" are exempt from the probable cause requirement of the Fourth Amendment to the United States Constitution? (First Appeal).

PARTIES TO THE PROCEEDINGS AND CORPPORATE DISCLOSURE STATEMENT

Petitioner is Greg Morgan, an individual.

Respondents are: The United States Of America; The United States Department Of Defense; William Cohen, in his capacity as Secretary of the Department Of Defense; The United States Air Force; General Richard Reynolds, as an individual and in his capacity as Commander, Flight Test Center, USAF; Colonel Edward Deiulio, as an individual and in his former capacity as Base Commander of Edwards Air Force Base, USAF; Colonel Neil Rader, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. Eric Broughton, as an individual and in his capacity as Sergeant, USAF; Kenneth Erichsen, as an individual and in his capacity as Sergeant, USAF; Eric Goodson, as an individual and in his capacity as Airman, USAF; and DOE's 1 through 10, inclusive.

No party to this petition is a corporation or controlled by a corporation.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 166 Fed. Appx. 292, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1-5.[1] The District Court's opinion is unreported, and is printed at Pet. App. 31-32 (Amended Order), Pet. App. 24-30 (Amended Findings of Uncontroverted Fact and Conclusions of Law), and Pet. App. 21-23 (Amended Findings).

The two opinions of the Court of Appeals for the prior appeal is reported at 60 Fed. Appx. 180 and is reprinted at Pet. App. 6-15 and 323 F.3d 776, and is reprinted at Pet. App. 16-20. The District Court's opinion is unreported and is reprinted at Pet. App. 55-58.

The Superior Court's opinion is unreported and is printed at Pet. App. 59-60.

JURISDICTION

The Court of Appeals entered its judgment on February 28, 2006 and denied the petition for panel rehearing and the petition for rehearing en banc April 19, 2006 printed at Pet. App. 61. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] As this concludes the action below, all opinions of the court of appeals are now ripe.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves provisions of the Fourth Amendment of the United States Constitution and Federal Rules of Civil Procedure 15(a) (Fed.R.Civ.P.).

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See* U.S. Const. amend. IV.

Fed.R.Civ.P. 15(a) provides: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." *See* Fed.R.Civ.P. 15(a).

STATEMENT OF THE CASE

It is fair to say, this is one of the most important Fourth Amendment cases to reach this Court. Resolution of the question presented here will largely determine the

value, indeed the very significance of our Constitution for generations to come. The case arrives after the span of two separate appeals, three opinions and over four years in the Ninth Circuit Court of Appeals without respondents' ever answering what should have been the operative complaint.

Respondents (defendants) operate or administer an administrative scheme on a National level, designed to admit or deny entry to military installations. Near an "Installation Entry Point," petitioner (plaintiff) was asked to consent to a vehicle search he denied the request. Petitioner was charged with various state offences and prosecuted in California Municipal Court. Adjudicating a pretrial suppression motion,[2] the Municipal Court Judge held the "administrative goal * * * must provide the least intrusive invasion of privacy" in rejecting argument that "implied consent" overrode an "express refusal." The charges were terminated in petitioner's favor because the goals of administrative search no longer controlled the situation – the remedy upon denial was to require petitioner to leave. Pet. App. 59-60. Petitioner filed a civil rights action in district court.[3]

On the first appeal, the Ninth Circuit on its own accord determined to "decide when a search conducted at the entry gate to a military base is reasonable." Pet. App. 6, 323 F.3d at 778. The Ninth Circuit reversed the district

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[2] In California, a Penal Code § 1538.5 proceeding is a preliminary hearing and an adversary judicial proceeding, designed to litigate the issue of probable cause. *See, e.g., McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138 (1999).

[3] Asserting jurisdiction under 28 U.S.C. § 1331 (Federal Question), § 1331, § 1343, and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

court's Fed.R.Civ.P. 12(b)(6) order which terminated the *action* with prejudice in favor of defendants.[4] The district court's order held the defendants were "not required to have probable cause to stop, inspect and/or search plaintiff and his vehicle, or detain and arrest the plaintiff." Pet. App. 55-58. Rejecting that holding, the Ninth Circuit held: "The district court's reasoning goes too far in allowing a *categorical exception* to the probable cause rule *for all searches* on closed military bases" and imposed its own standard, "implied consent." Pet. App. 15, 323 F.3d at 782 (emphasis added).

Reiterating the district court's conclusion, the Ninth Circuit held, "section 1983 * * * requires action under the color of state law" because the complaint failed to "allege" a status as both a "federal and local employee" and upon the premise of a Pet. App. 18, 60 Fed. Appx. 180 at 181 "stop, search, and seize," the gate guards sequentially "initiated the law enforcement activities at issue * * * within the course and scope of their Base security duties." *Id.* The Ninth Circuit acknowledged, in its own words, that plaintiff raised "several other issues on appeal, including the *propriety of the dismissal* of his section 1983 claims." Pet. App. 7 fn2, 323 F.3d at 778, fn2 (emphasis added). Included however, were instructions for the district court "to determine the *propriety of dismissal*" upon "development of the factual record." Pet. App. 11, 323 F.3d at 780 (emphasis added). The court restored the *action*, remanding "to the district court for *further proceedings* on

[4] The action was terminated in the early stages, before discovery had commenced, and before respondents submitted a "responsive pleading."

a more *complete factual record*" upon a surviving "*Bivens* claim." Pet. App. 15, 323 F.3d at 782 (emphasis added).

Facts obtained, not from respondents but from a prior FOIA[5] response long overdue, confirmed the administrative character of the search regime. Pet. App. 70-72. The 5 lb. box included many documents previously unknown,[6] as well as a transcript of a tape recording secretively made on the date of the incident. Pet. App. 73.[7] The documents detailed the procedures required under the administrative search scheme and answered many questions. The question "whether implied consent was present" turned unexpectedly – the answer, clearly no. Pet. App. 73 ¶ 24-1.

The answer was no because the regulations provide – demand that the gate guards refuse entry to the "Installation" as a consequence to denying the request (consent) to search. Preserving the administrative character of the search regime, the regulations establishing it, divested the "Federal Officers" of all law enforcement authority – they were without power to act "under color of federal law." The transcript confirmed that the "law enforcement activities at issue" were possible only because one of the defendants,

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[5] Freedom of Information Request.

[6] The new documents also established missing critical elements of the evidentiary timeline and demonstrated that the documents presented to the state district attorney were vetted then altered. The altered documents coupled with the documents withheld, concealed respondents' full involvement and true motives. Because of the coincidence of timing, the unfolding of the procedural processes in the state court and in the district court, petitioner was prevented from obtaining the new documents at any time sooner.

[7] Petitioner had prior knowledge of the existence of a tape recording, but had no prior knowledge of its content.

a full time deputy sheriff, invoked his state power (direct state action). The events as provided in defendants' police report were not, as advertised, a "stop, search, and seize"; it was a search incident to arrest, an arrest possible only because a state "peace officer" was present. *See* C.P.C. § 148(a) (resisting, delaying, or obstructing a California Peace Officer). "Implied consent" had no relevancy to the events.

The distinct court had not held conclusively, in dismissing the action, the complaint unsalvageable, "It does not *appear* Plaintiff could state a claim * * * if allowed to amend." Pet. App. 57 ¶ 6 (emphasis added). Defendants had not answered the complaint, and plaintiff had been deprived of his right to amend "once," when the *action* was terminated. The Ninth Circuit had restored the *action* to determine the "propriety of dismissal" and for "further proceedings" upon facts to determine if plaintiff "impliedly consented to the search." If "implied consent" were to be determined, some quantifiably measurable standard was necessary. The facts obtained demanded the complaint be amended to assert a foundation of an administrative search.

On remand, plaintiff endeavored to amend his pleading "once as a matter of course,"[8] on three separate occasions. On 05-02-03, the first instance, the clerk erroneously recorded it as "lodged" and not filed. Seeking to correct the error, on 05-13-03, the first amended complaint was re-filed. The clerk repeats the error, again

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[8] The decision of the Ninth Circuit was issued on 03-18-03, the mandate was issued on 05-12-03, and the district court received and lodged it on 05-13-03, filing it on 05-16-03.

recording it as "lodged" and not filed. Six days later on 05-19-03, the district court, on its own, orders a status conference for 06-09-03, for "filing and spreading mandate" and to "address issue of notice of document discrepancy attempted[9] filing of the first amended complaint." Pet. App. 47, 48. During the status conference, the district court apparently unaware, learns that a "responsive pleading" had not been filed; declares the first amended complaint "should be filed with the court," the first amended complaint is again filed. Pet. App. 44, 46.

On 08-29-03, the district court *sua sponte* orders the 06-09-03 amended complaint stricken stating it was filed "without leave of the court" and also orders the 05-02-03 first amended complaint stricken stating: "No CCAP order has been filed & spread. The case has never been reopened." Pet. App. 42. On 08-28-03, petitioner motions to file a first amended complaint and on 09-08-03 follows with a motion for "certification and order" for a permissive appeal to the Ninth Circuit, to settle the question of the right to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served." On 10-03-03, after full briefing, the district court grants the motion to amend the complaint and denies as moot the motion for "certification and order" for a permissive appeal to the Ninth Circuit on 10-06-03. Pet. App. 39. When the district court granted the motion to amend the complaint,

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[9] No disposition was issued upon the 05-13-03 first amended complaint and its existence in the record is scarcely evidenced. The clerk's Docket Report provides: "and wil [sic] also address issue of notice of document discrepancy *re attempted* filing of the first amended complaint." Pet. App. 101 (emphasis added).

the discovery schedule set during the status conference of 06-09-03 had expired.

The district court grants summary adjudication in favor of defendants, not upon the first amended complaint, but upon the original complaint by declaring the amended complaint "barred by the doctrines of res judicata and the law of mandate." Pet. App. 29 ¶ 3-4 ("all claims in the first amended complaint * * * are barred by the doctrines of res judicata and the law of mandate"). Elimination of the first amended complaint worked a chain reaction; the factual foundation that the searches are administrative searches – gone, and all motions[10] directed at advancing that factual assertion were denied including the Fed.R.Civ.P. 56(f) relief. Pet. App. 32 (holding "that any form of relief * * * would [not] result in * * * facts essential to preclude * * * summary adjudication").

On the second appeal, the Ninth Circuit affirmed the district court's summary adjudication granted in favor of defendants. The Ninth Circuit endorsed not only the district court's adjudication upon wrong facts; but also the district court's conclusion that passing an equivocal welcome sign was implied consent. The true facts of an

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[10] In its own words, the Ninth Circuit stated as "extensive" the "history of this litigation." Pet. App. 12, 166 Fed. Appx. 292, 294. The history following the 10-03-03 order granting the amended complaint erupted as a result of plaintiffs' effort to enforce the legal status of the first amended complaint. These efforts included multiple motions for discovery orders, judicial notice and "Full Faith and Credit" of the state court decision, resetting the discovery schedule and trial date, protective order, strike under Fed.R.Civ.P. 8(b), Fed.R.Civ.P 8(c), and Fed.R.Civ.P. 56(f), temporary stay for time to request the Ninth Circuit for recall of mandate and others. The district court simply denied petitioner's motions without explanation; the reason became apparent in granting summary adjudication.

administrative search gone badly were missing because the right to amend was denied. Whereas, the district court rationalized its denial of the right to amend by the Ninth Circuit's "affirm[ance] in every respect," the Ninth Circuit rationalized it's denial though its erroneous holding that a district court had the discretion to deny the right to amend. The result was a circular, but breathtaking repudiation of the Fourth Amendment. The dilemma was created because the Ninth Circuit misreads this Court's holding in *Foman v. Davis*, 371 U.S. 178 (1962) (*Foman-Davis*) and thus believes Fed.R.Civ.P. 15(a) gives a district court discretion to deny amendments, contrary to the express terms of Rule 15(a).

Notwithstanding an amended complaint, respondents obtained summary adjudication upon the original complaint. The Ninth Circuit affirmed this adjudication because it refused to apply the first sentence of rule 15(a). Its refusal is a radical departure from the principle that courts are to "apply the text, not improve upon it." *See Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989). The Ninth Circuit read *Foman-Davis* not as endorsing, but as rejecting this established principle. The Ninth Circuit's policy is that a district court has unlimited discretion to deny the right of a pleader to amend once. *Foman-Davis* did not purport to decide how the first sentence of Rule 15(a) applies. Indeed, it left such questions open. *Foman-Davis* manifestly did not dictate the result the Ninth Circuit reached in this unbroken single numbered action. Not surprisingly, every circuit that has endeavored to fashion a meaningful amendment policy encompassing the first sentence of the rule based upon *Foman-Davis* second

sentence determination has reached diametrically opposed conclusions on these same issues.

Review is urgently needed not only to resolve the conflict between the Circuits, but more importantly to clarify the applicability and meaning of the rule. Indeed, this Court's recent statements in *Mayle v. Felix*, ___ U.S. ___, 125 S.Ct. 2562, 2569, 162 L. Ed. 2d 582 (2005) (*Mayle-Felix*) addressing the first sentence of Rule 15(a) indicate that all Circuits' policy regarding amendment are overly broad and infirm. Left undisturbed, the Ninth Circuit's decision effectively insulates any defendant from suit nationwide, where a defendant has hidden the true facts and a plaintiff does not have full possession of those facts, before a suit is filed. Indeed, the Ninth Circuit's decision threatens the very foundations of notice pleading. Resolution of the question presented here will largely determine the rights of civil litigants to amend once as a matter of course.

A. Events, May 16, 1999

On 05-16-99, at 09:41, plaintiff was stopped outside of the "Installation" entry of Edwards AFB, California. Three gate guards approached plaintiff's vehicle. One of the gate guards (defendant "Goodson"), supervised by the other two, reading the prepared statement from an Air Force Form, asked plaintiff for permission to search his vehicle. Plaintiff denied the request. For the next 27 minutes, the gate guards sought to extract consent, the tools of which included harassing, threatening and intimidating plaintiff. Their efforts were rebuffed, and on at least 17 different occasions, plaintiff said "no." At no time did the gate

guards follow their orders and instruct – or allow – plaintiff to leave.

The gate guards retreated visibly angry to an area approximately 12 feet behind plaintiff's vehicle and conferred among themselves. After a period of time, plaintiff exited the vehicle to use the public telephone. The telephone was located across the roadway, in a building called the "Visitor Reception Center." When plaintiff was halfway across the roadway, some 25-30 feet away from the gate guards, he heard a shout from behind. Turning around to face the shout, plaintiff said "What?" defendant Broughton ("Broughton") shouted, "Get back in your car." Plaintiff replied, "I'm late for work, and need to use the telephone . . . am I under arrest?" Broughton replied "No!" At that instant one of the other gate guards shouted "FREEZE." Broughton screamed "COVER ME" and all the gate guards grabbed their weapons. Plaintiff did not move for fear of his life.

Broughton then ran towards plaintiff, smashing into him; then handcuffed him. Broughton then walked plaintiff to the Visitor Reception Center. Goodson and an Airman Fultz were ordered to watch over the handcuffed plaintiff at gunpoint. Broughton then ordered defendant Erichsen ("Erichsen") to assist him in searching plaintiff's vehicle. During that search, an unloaded handgun belonging to plaintiff's wife, a police officer, was discovered (she was on the base pistol team). The weapon was described by Broughton and Erichsen as being "in plain view." However, the vehicle was locked and outside of Morgan's immediate control.

Approximately 40 minutes later, plaintiff, a prisoner, was driven into the "Installation" to security police

headquarters. Plaintiff in handcuff's was locked in a small room, and then subjected to an intense, illegal custodial interrogation. Plaintiff invoked his right to counsel and demanded that he be read his rights, many times over, neither of which were provided to him. Approximately 4 hours later, defendants summoned Deputy Ian Chandler of the Kern County Sheriff's Department who transported plaintiff to the county jail.

REASONS FOR GRANTING THE PETITION

There are conflicts in the circuits regarding interpretations of Fed.R.Civ.P. 15(a) and *Foman-Davis*, which have recently been identified by *Mayle-Felix*. This Court's determination is necessary on the following question: Whether the court of appeals erred in concluding that this Court's decision in *Foman-Davis*, grants courts discretion to deny an amendment asserted under the first sentence of Fed.R.Civ.P. 15(a)? The second question presents exceptionally important questions of federal law: Whether the court of appeals erred in holding that "military bases" are exempt from the probable cause requirement of the Fourth Amendment to the United States Constitution?

A. ARGUMENT - First Question

The Ninth Circuit Court Of Appeals Impermissibly Allows The Denial Of The Right To Amend A Parties Pleading Once

As an initial matter, Rule 15(a) allows a party to amend its pleading as of right "at any time before a responsive pleading is served." Fed.R.Civ.P. 15(a). When a claim is altered or added through an amendment as of

right, the plain language of Rule 15(a) does not give a district court or an appellate court the power to deny the right. The right is immutable and the power to terminate the right does not rest with the courts, it rests exclusively at the hands of a responding party who must take affirmative action defined by reference in Fed.R.Civ.P. 7(a), *e.g.*, "answer."

1. The Court of Appeals Conflicts With This Court's Precedents in *Foman-Davis*

In *Foman-Davis* this Court held "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." The Ninth Circuit interpreting *Foman-Davis* does not cutoff the right after dismissal for failure to state a claim, *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995); does not cutoff the right after summary judgment, *Doe v. United States* (*In re Doe*), 58 F.3d 494, 497 (9th Cir. 1995) – summary judgment case); does not cutoff the right after losing an appeal; *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986). The rationale is "The policy in favor of allowing amendments is extremely liberal"[11] and any submission other than those defined in Fed.R.Civ.P. 7(a), is not a responsive pleading within the meaning of the rule. *See e.g., Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Thus, generally in circumstances like the present, where part of an action survives appeal, and no responsive pleading is filed, an amendment is proper.

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[11] Quoting 3-15 Moore's Federal Practice-Civil § 15.11 (2006).

Yet the court believes that Rule 15(a) (as the Ninth Circuit has over broadly interpreted *Foman-Davis*) allows a court to "cutoff" at any stage, the right to amend if the court determines (even before submission) that an amendment cannot save the action and justifies its determination upon any of the factors provided in *Foman-Davis, e.g.,* (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile. *See e.g., Doe v. United States* (*In re Doe*), 58 F.3d 494, 497 (9th Cir. 1995) (paying homage to the first sentence then declares "a district court *should* grant leave to amend * * * unless it determines that the pleading could not possibly be cured by the allegation of other facts.") (Internal citation omitted, emphasis added.) Where a district court provides "justification," the Ninth Circuit reviews the denial of the right for "abuse of discretion" and where a district court fails to provide "justification," an abuse of that discretion is generally found. *Swanson v. United States Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996).

One striking feature of *Foman-Davis* and the main bone of contention was that this Court never stated the text of the first sentence, but explicitly stated the text in the second sentence and the discretion for a court to grant or deny an amendment flows from the latter not the former. Because the case did not involve the first sentence of Rule 15(a), "the grant or denial of an opportunity to amend" is not within the discretion, or even the court's jurisdiction. The plain language of the first sentence declares the right to amend is immutable, terminated only by the responding party taking one or more of the elected courses of action provided in Rule 7(a) or otherwise by the party seeking to amend, exercising "once" the right. The

Ninth Circuit's over broad inclusion of the first sentence in its Rule 15(a) jurisprudence declares that sentence meaningless.

The Ninth Circuit implicitly recognized that its broad interpretation was problematic when it echoed the determination in *Costantini v. Trans World Airlines,* 681 F.2d 1199, 1201 (9th Cir. 1982). *Costantini-Trans World Airlines* was a case where the entire action was involuntarily dismissed and the dismissal was affirmed on appeal. No part of the original action survived. The plaintiff subsequently filed another action quickly on the heels of the prior action and the defendant successfully claimed the involuntary dismissal of the prior action operated as *res judicata* (collateral estoppel).

The Ninth Circuit then went on to apply "*res judicata*" in this case; as it thought *Costantini-Trans World Airlines* dictated. Yet the factual context here differs from *Costantini-Trans World Airlines* in critical ways, the case at bar is the same ongoing single numbered action, and the amendments arose from a change in facts essential to the prior judgment. *See Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

Ignoring the carefully circumscribed nature of the Court's amendment analysis, the Ninth Circuit held that *res judicata* barred the amendments, thus, misreading virtually every decision dictating that res judicata applies to a completed lawsuit.[12] Specifically, the court held that

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[12] *See e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327, fn5 (1979). "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a

(Continued on following page)

petitioner's amended claims "were either already litigated, or should have been raised in his original Complaint" – a standard that appears nowhere in *Costantini-Trans World Airlines* itself or in the law of *res judicata*. The factual context here differs from *Costantini-Trans World Airlines* in critical ways, raising important issues that were either expressly reserved or simply not presented by that case.

Ninth Circuit followed its unfounded interpretation that *Foman-Davis* granted broad discretion, by affirming the district court's multiple strikes of the amendment filed by right and upholding the summary adjudication even where an amended complaint should have superseded the original complaint in all respects. The court viewed the amended complaint filed by right as irrelevant because *Foman-Davis*, in its view, gave lower courts discretion to deny the amendment. As a consequence, courts could also, without any actual or constructive notice, ignore the amendment and no abuse would be found.

By forcing the square peg of this case into the round hole of its overly broad *Foman-Davis interpretation,* the Ninth Circuit created a completely novel test for reviewing the denial of amendments filed by right; unmoored from law or logic. The test poses a grave threat to the very balance between litigants that the federal rules intended to provide, hinders the disposition of litigation on the merits and fosters the perception that the pleadings are ends in themselves.

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different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Id.*

2. There Is Direct And Acknowledged Conflict Within The Circuits

The Ninth Circuit's view creates a direct and acknowledged conflict with every other circuit, who then do not agree between themselves and in light of this Court's ruling in *Foman-Davis* it is hardly surprising that the decision below diverges markedly from every other circuit's law on the core question that this case presents.

In describing the divergence, Moore's Treatise states: "The federal circuits disagree, however, as to whether the plaintiff's right to amend without leave terminates with dismissal, and this distinction is directly tied to whether the dismissal is considered a final and appealable order" 3-15 Moore's Federal Practice – Civil § 15.12 (3d ed. 2006). The divergence materializes over the terms "complaint" or "action," that is, whether dismissal of a complaint or dismissal of the action terminates the right to amend. What evolved essentially, is that the circuits split into three major camps, with each camp not precisely in agreement with the others in its own camp.

Differing from the Ninth Circuit, the First, Second, Eight and Tenth Circuits hold that, unless the court expressly grants leave to amend, an order dismissing the complaint is final, terminating plaintiff's right to amend once as a matter of course. *See Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 389 (1st Cir. 1994); *Weisman v. LeLandais*, 532 F.2d 308, 309 (2nd Cir. 1976); *Quartana v. Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986); *Calderon v. Kansas Dept. of Social & Rehabilitation Services,* 181 F.3d 1180, 1185 (10th Cir. 1999). When a district court orders the complaint dismissed without expressly granting leave to amend, the decision is final and there is no right to

amend. A plaintiff must appeal or move to reopen the case under Fed.R.Civ.P. 59(e) or 60(b) and then move again for leave to amend. *Id.*, 532 F.2d at 309.

The Fifth and Eleventh Circuits split the line between the distinction of "complaint" and "action" and rather focus on intent. An order dismissing the complaint is not a dismissal of the action unless it also states the right is denied or otherwise indicates no amendment is possible. *Whitaker v. City of Houston, Texas,* 963 F.2d 831, 835 (5th Cir. 1992); *Czeremcha v. International Ass'n of Mach. & Aero. Workers*, 724 F.2d 1552, 1554 (11th Cir. 1984).

The Fourth Circuit however has not weighed in on such distinction. Taking a literal view that *Foman-Davis* decided the entire meaning of Rule 15(a) and in its view a district court has exclusivity to grant or deny an amendment; thereby avoiding the controversy. *See Healthsouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1010 (4th Cir. 1996) (holding that the "decision to grant a party leave to amend its pleadings rests within the sound discretion of the district court") (citing *Foman-Davis*, other citations omitted). Thus where a district court has exclusive discretion, a plaintiff's "right" is irrelevant and a district court need not "articulate grounds for denying a plaintiff's leave to amend" and if it chooses not to, it "does not amount to an abuse of discretion." *Id.*, at 1010 (internal citation omitted).

The common thread apparent in all the above referenced circuits is not whether a distinction exists between "complaint" and "action," but rather when a district court can exercise its discretion to deny an amendment by right. The Eleventh Circuit perhaps makes this point perfectly clear and illuminates the tension which causes

the drawing of distinctive lines. "We believe that this approach is consistent with Rule 15's liberal mandate that leave to amend be 'freely given when justice so requires,' *without granting the plaintiff carte blanche power to reopen a case at will by filing an amendment.*" *See* 724 F.2d at 1554-1555 (emphasis added) citing a Fourth Circuit Rule 12(b)(6) case, *Clardy v. Duke University*, 299 F.2d 368, 369-370 (4th Cir. 1962).

The statement exposes the collision between *Foman-Davis*'s demand that leave be "freely given" and interpretations excluding the first sentence of Rule 15(a). The first sentence of Rule 15(a) does not, however, illuminate any other circumstances when amendment of the complaint is or is not appropriate except "once" and "at any time." Fed.R.Civ.P. 15(a). The plain language of the Federal Rules and the equitable goal of merits determination compel this result, a result that *Foman-Davis* endorsed, not rejected. If discretion is wanted, the lower courts cannot do so by fiat; the rulemaking process requires amendment. Given this, it is unsurprising that the rhetoric used by the federal courts is notice pleading. The reality, however, is the lower court practice – using all manner of degree of discretion – denies the result and upsets the balance between parties the rules intend to provide.

The Seventh Circuit however, stands apart in that regard. The court held in *Hill v. City of Indianapolis*, 17 F.3d 1016, 1018 (7th Cir. 1994), where the plaintiff indicated the desire to amend by right, the dismissal below cannot constitute a final judgment until all matters relating to the action were terminated. *See also Bieneman v. City of Chicago*, 838 F.2d 962, 963 (7th Cir. 1988) (no final judgment because court did not decide all issues).

This approach is more consistent with the text of the first sentence. In each case, the Seventh Circuit did not review for "abuse of discretion" but for error. This approach is more consistent with the language of the rule.

3. There Is Direct And Acknowledged Conflict With The Seventh Circuit

The Ninth Circuit and the Seventh Circuit are in direct conflict over what a plaintiff must show to establish that the right to amend was denied. The Ninth Circuit requires a showing that a district court "abused discretion" in denying an amendment by right. *See* Pet. App. 3, 166 Fed. Appx. 292, 294 (holding that "The district court properly dismissed * * * the non-*Bivens* claim raised in his *Bivens* complaint"). Thus, where a plaintiff has a substantial basis to amend, the district court can exercise "discretion" and preempt that right, without reviewing the amendment, and on appeal the burden rests with the plaintiff to prove abuse.[13]

The Seventh Circuit, in contrast, predicts not whether amendments are possible, *see* 17 F.3d at 1016 (holding that the district court had an "obligation to review" an amended complaint, it is insufficient merely to presume that an amendment would be futile), but where the right remains "dismissal [based upon] the original complaint * * * could not possibly constitute a final judgment" *id.*, and that the action cannot terminate until the amended complaint assumes its proper standing (holding that "absence of a ruling on the Amended Complaint, the case was not 'closed,'"). *Id.* Thus, where a plaintiff

[13] In the case at bar, this issue is presented from both appeals.

expresses a desire to amend, the burden is not upon the plaintiff to prove abuse, but upon the district court to grant the right and adjudicate upon the amended pleading before the case is ripe for an appeal.

4. The Circuits Are In Conflict With This Court's Statements In *Mayle-Felix*

Recently in *Mayle-Felix* this Court indicated that *Foman-Davis* was not a matter intended to adjudicate the first sentence of Rule 15(a). Jacoby Lee Felix was convicted of first-degree murder and second-degree robbery. During his trial, Felix argued that the admission into evidence of his confession to the police violated his 5th Amendment right against self-incrimination and also argued that his 6th Amendment right to confront witnesses testifying against him was violated at trial.

After exhausting his state appeals, Felix filed a habeas corpus petition asserting only the 6th Amendment Confrontation Clause claim. Later, Felix filed an amendment to his petition, reasserting the 5th Amendment claim. The district court rejected the 5th Amendment claim as time barred under the Antiterrorism and Effective Death Penalty Act (AEDPA).

The Ninth Circuit Court reversed in a 2-to-1 decision, reasoning that Felix's coerced confession claim "arises from the same transaction – his trial and conviction in state court" thus relates back to the original petition under Fed.R.Civ.P. 15(c)(2), an amendment was proper notwithstanding the AEDPA one year statute of limitations.

On review, this Court reversed the Ninth Circuit, holding that Felix's amended petition did not relate back to the date of his original timely-filed petition because "conduct, transaction, or occurrence" were not the same as "trial, conviction, or sentence" and thus the amended petition supported by new facts that differed in both time and type was untimely under Fed.R.Civ.P. 15(c)(2).

While not the issue on review, discussion turned on the meaning of Rule 15(a) over concern if this Court were to adopt as Felix urged, the view of the Ninth Circuit, that a petition could be amended after the one year statute of limitations. Felix argued (and the Ninth Circuit held) however, that Rule 15(a) arms district courts with ample power to *deny leave* to amend when justice so requires. This Court implicitly affirmed that view to be wrong. In rejecting that argument, this Court stated the "argument overlooks a pleader's right to amend without leave of court 'any time before a responsive pleading is served'." *Mayle-Felix* at 2574.

This Court's[14] statement affirms that the first sentence has meaning, and makes clear, the Ninth Circuit's view that *Foman-Davis* swallowed all of Rule 15(a) is wrong. Where "leave of court" is not an element of the "pleader's right to amend," the district court has no discretion to either approve or deny the amendment. The

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[14] The dissent also elucidated the outer parameters of Rule 15(a), stating the "opportunity to amend as a matter of course, *without permission of the trial court*, exists only before the responsive pleading is served, and even then only once * * * . After one amendment, or after the government files the answer * * * the prisoner may not amend without the court's leave or the government's consent * * * ." *Id.* at 2575 (emphasis added).

clarifications provided in *Mayle-Felix* does, by implication, disturb those circuits' standard of review founded upon discretion and lend support to the Seventh Circuit's view that a district court is simply wrong to deny the right.

B. ARGUMENT - Second Question

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The facts of this case are a blend between two of this Court's precedents. In *Flower v. United States*, 407 U.S. 197, 198 (1972) (*Flower-United States*),[15] this Court reversed a conviction for distributing leaflets on a military base where the "fort commander chose not to exclude the public from the street where petitioner was arrested" and where "there [wa]s no sentry post or guard at either entrance or anywhere along the route" and "traffic flowed through the post on this and other streets 24 hours a day" (citations omitted). In *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961) (*Cafeteria-McElroy*),[16] this court upheld the authority of the commander of a military base to deny employment to a civilian cook through the summary revocation of her identification badge thereby preventing her from passing through the entrance of the military installation.

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[15] A first amendment case.

[16] A fifth amendment case.

The facts of this case are similar to *Flower-United States*, in that a nine-mile highway running west-east leading to the "installation entry control point" is under concurrent legislative jurisdiction of both the State of California and the federal government; patrolled by Kern County Sheriff's deputies, is "open" for public use and to the south is a wetlands preserve administered by various state and federal agencies.[17] The facts are similar to *Cafeteria-McElroy*, in that the north side of the highway is paralleled by a barbed wire fence with attached warning signs, an "installation entry control point" at the end marked by a gate, with armed guards, a warning sign, a visitor reception center[18] and regulations codifying the procedures for entering the "installation." Pet. App. 26.

1. The Ninth Circuit Court Of Appeals Has Decided A Question Of Federal Law That Should Be Settled By This Court

In deciding "when a search conducted at the entry gate to a military base is reasonable" the Ninth Circuit declared "searches on closed military bases have long been exempt from the usual Fourth Amendment requirement of probable cause." Pet. App. 13, 323 F.3d 776, 778, citing *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993).The Fourth Amendment received its first blow when the court rejected the probable cause requirement in favor of the reduced standard of reasonableness holding that "implied consent" excepted the probable cause rule even in the face

[17] Including the Department of Defense.

[18] The visitor reception center is open for pubic use, for those seeking entry to the installation.

of an express denial.[19] The court further held "a person may impliedly consent to a search on a military base."

On the second appeal, the Fourth Amendment received its second blow when the Ninth Circuit affirmed the district court's implementation of "implied consent" – a "welcome" sign provided notice of the existence of a federal enclave, thus any expectations of privacy, gone. *See* Pet. App. 27 ¶ 15 (finding that the "incident occurred * * * [j]ust *before* the guard gate" meaning upon the public highway) (emphasis added). The Fourth Amendment received its final blow when the Ninth Circuit reiterated a prior declaration it made in the first appeal, "we 'affirmed the district court in *every respect* * * * '" engulfing district court's prior 12(b)(6) order declaring that probable cause is "not required * * * to stop, inspect and/or search * * * detain and arrest." Pet. App. 2, 166 Fed. Appx. 292, 293-294. The Ninth Circuit perfected the elimination of the Fourth Amendment with its combined rulings, holding that a traveler who crosses a federal property line, which includes in its name, "base" has no privacy expectations and can be summarily seized and searched. However, the premise that property interests control the right of the government to search and seize has been discredited. *See Katz v. United States*, 389 U.S. 347, 353 (1967).

The final result upholds the initial false presumption that "bases have long been exempt from the usual Fourth Amendment requirement of probable cause." Pet. App. 13, 323 F.3d 776, 781. Yet this Court has never endorsed such

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[19] Pet. App. 8, 323 F.3d 776, 779. "Goodson informed Morgan that he wished to search Morgan's vehicle and asked Morgan if he would consent to a vehicle search. Morgan refused."

notion and this Court has rejected the notion of carving territorial holes in the states. The existence of enclave does not and has never altered the geographical structure of the state of California. This was the findings in *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953). The highway where the incident occurred was open to the public and is under concurrent jurisdiction with the State of California. The highway is patrolled by state law enforcement. By the express terms of the Ninth Circuit's false premise, "searches on closed military bases have long been exempt from the usual Fourth Amendment requirement of probable cause" creates a peculiarity the state officers patrolling that stretch of highway are no longer constrained by the strictures of the Fourth Amendment.

2. The Court of Appeals Conflicts With This Court's Precedents in *Cafeteria-McElroy*

The Ninth Circuit's decision here conflicts with this Court's determination in *Cafeteria-McElroy*. In *Cafeteria-McElroy*, this Court held that a "commanding officer" possesses "the historically unquestioned power * * * to exclude civilians from the area of his command," in answer to the question, "[w]as the commanding officer * * * authorized to deny * * * access to the installation * * * ?" *Id.*, at 893, 889. The unquestioned power to exclude does not translate into an unfettered right to search outside of *installation*.[20]

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[20] The Department of Defense Dictionary explains the distinction of the terms base and installation. An Installation is the area wherein security might be imposed. A base contains one or more installations, including property that is "open."

Absent suspicion of criminal wrongdoing, a search or seizure may not be conducted for the purpose of discovering evidence of a crime. "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individual suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). The only exceptions to this rule occur when the government seeks goals "beyond the normal need for law enforcement." *Id. See also Michigan v. Tyler*, 436 U.S. 499, 512 (1978); *Brown v. Texas*, 460 U.S. 730, 743 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976).

In *Brown*, this Court permitted the introduction of evidence discovered in a roadblock to ensure that all motorists are licensed. This Court recognized, however, that there was "no suggestion that the roadblock was a pretext whereby evidence of narcotics might be uncovered in 'plain view.'" *Id.*, at 743. Roadblocks and suspicionless seizures of automobiles have been permitted where the government has been able to identify a goal separate from criminal enforcement, a valid public interest that is immediately served through the roadblock itself. Specifically, this Court has permitted a roadblock to ensure the integrity of international borders and to ensure the safety of the motoring public. These exceptions are consistent with the Court's recognition that when "concerns other than crime detection * * * are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler v. Miller*, 520 U.S. 305, 314 (1997). The public interest justified an administrative exception limited by clear and defined procedures.

Here the military has promulgated regulations controlling entry to its installations. These procedures are commensurate with the right to exclude – are the terms set for entry. Regulations established at military installations are deserving of special consideration. *See, generally, Greer v. Spock*, 424 U.S. 828, 837-38 (1976). The Ninth Circuit held that *United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977) and *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993), provided authority for its erroneous premise that "military bases have long been exempt from the usual Fourth Amendment requirement of probable cause." Both of those cases are distinguishable upon the facts and law.

Jenkins recognized the defendant had passed through the gate of the *installation*. *Ellis* also recognized the distinction of passing through the gate and "installation" versus "base." *See, also United States v. Vaughan*, 475 F.2d 1262, 1264 (10th Cir. 1973) (holding "once within [installation] the area where security was imposed, a search conducted without probable cause and without consent could be proper"). *See, also* 18 USCS § 1382, "Whoever * * * goes upon any military * * * installation, for any purpose prohibited by law or lawful regulation; or Whoever reenters or is found within * * * installation, * * * Shall be fined under this title or imprisoned not more than six months, or both."

The regulations promulgated are designed to protect the interest of the military installation. Those regulations call for express consent. The military has determined their needs justify an administrative search at the entrance of an installation, not a blanket exception to the areas it has chosen not to secure; no emergency exists at an entry gate

or any point before. The Ninth Circuit was wrong in creating another exception to the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Greg Alan MORGAN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; WILLIAM COHEN, Former Secretary of Defense; UNITED STATES AIR FORCE; RICHARD REYNOLDS, General; EDWARD DEIULIO, Colonel; NEIL RADER, Colonel; C. ERIC BROUGHTON, Master Sergeant; KENNETH ERICHSEN, Master Sergeant; ERIC GOODSON, Airman, Defendants-Appellees.

Nos. 04-55758, 04-55761.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

166 Fed. Appx. 292; 2006 U.S. App. LEXIS 2942

October 31, 2005**, Submitted

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

February 7, 2006, Filed

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For UNITED STATES OF AMERICA, WILLIAM COHEN, FORMER SECRETARY OF DEFENSE, UNITED STATES AIR FORCE, RICHARD REYNOLDS, GENERAL, EDWARD DEIULIO, COLONEL, NEIL RADER, COLONEL, C. ERIC BROUGHTON, MASTER SERGEANT, KENNETH ERICHSEN, MASTER SERGEANT, ERIC GOODSON, AIRMAN, Defendant-Appellees: John E. Nordin, II, Esq., Sara R. Robinson, AUSA, USLA – OFFICE OF THE U.S. ATTORNEY, Civil & Tax Divisions, Los Angeles, CA.

JUDGES: Before T.G. NELSON, PAEZ, and TALLMAN, Circuit Judges.

OPINION: MEMORANDUM*

This is Morgan's second appeal to this Court. *See Morgan v. United States,* 60 Fed. Appx. 180 (9th Cir. 2003); *Morgan v. United States,* 323 F.3d 776 (9th Cir. 2003). In the first appeal, we "affirmed the district court in every respect, except with regard to the court's dismissal of the *Bivens* claim." *Morgan,* 60 Fed. Appx. at 181. In a separately filed published opinion, we remanded Morgan's *Bivens* claim in order "to allow the development of a more complete factual record to determine whether implied consent was present here." *Morgan,* 323 F.3d at 778. The parties are familiar with the extensive history of this litigation and therefore we will not recount it again here. We affirm the district court in every respect.

The district court did not abuse its discretion by denying Morgan's motion to extend the discovery cut-off and motion date. *See Martel v. County of Los Angeles,* 56 F.3d 993, 995 (9th Cir. 1995) ("[A] district court's decision to deny a continuance sought for the purposes of obtaining discovery will be disturbed only 'upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.'") (*Sablan v. Dep't of Fin.,* 856 F.2d 1317, 1321 (9th Cir. 1988)). The district court had already granted Morgan one continuance and given that the *Bivens* action was filed in May 2000, Morgan had more than sufficient time to conduct discovery.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

The district court properly dismissed Morgan's claim under the Federal Tort Claims Act (FTCA) (D.C. No. CV-03-02372-RSWL), as well as the non-*Bivens* claim raised in his *Bivens* complaint (D.C. No. CV-00-05221-RSWL), as they were all barred by res judicata. *See Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982) ("The doctrine of res judicata (or claim preclusion) bar(s) all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action." (internal quotation marks omitted)). This court may affirm the district court on any ground supported by the record. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

Morgan first attempted to raise his FTCA claim during his first appeal; however, this Court ruled that he had waived that claim because Morgan had failed to properly present it before the district court. *Morgan*, 60 Fed. Appx. at 182 ("This claim was not raised in the Complaint and is presented for the first time on appeal. It is waived and we do not consider it."). Furthermore, the non-*Bivens* claims that Morgan attempted to raise in his *Bivens* complaint were either already litigated, or should have been raised in his original Complaint. Therefore, Morgan is barred from pursuing these claims based on the doctrine of res judicata. *See Costantini*, 681 F.2d at 1202 (ruling that a cause of action raised in a instant lawsuit was barred by res judicata because it was identical to one raised in the prior suit).

As for Morgan's *Bivens* claim, the district court granted the defendants' motion for summary adjudication, ruling that the defendants were entitled to judgment as a matter of law because, (1) the federal officers were protected by qualified immunity; or (2) Morgan impliedly

consented to the search by presenting himself at the gate. We review the district court's grant of summary judgment de novo: *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). Although the court must draw all reasonable inferences in Morgan's favor, the court need not draw an unreasonable inference or accept conclusory allegations. *See Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 345 (9th Cir. 1995) ("Such conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment.").

After the defendants met their burden of showing a lack of evidence to support's Morgan's claims, the burden then shifted to Morgan to set forth specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Rather than respond to the defendants' motion for summary adjudication, Morgan chose to file a Rule 56(f) request seeking a continuance of the summary judgment proceedings.[1]

Since Morgan failed to submit any affidavits or declarations to contradict the evidence submitted by the defendants, the district court found the following facts to be uncontroverted: (1) at the time of the incident, Edwards AFB was a closed base; (2) Morgan was transferred to the

[1] Morgan also challenges the district court's denial of his Rule 56(f) request. Again, this incident occurred in 1999 and the *Bivens* action was originally filed in 2000. Morgan had ample opportunity to conduct discovery and his Rule 56(f) motion provided only conclusory and speculative statements. We therefore hold that the district court did not abuse its discretion in denying Morgan's Rule 56(f) motion. *See Jones v. Blanas*, 393 F.3d 918, 918 (9th Cir. 2004) (stating that a district court's decision not to permit additional discovery prior to considering a summary judgment motion is reviewed for an abuse of discretion).

Base in 1998; (3) Morgan regularly commuted to work; (4) Morgan's route to work was dominated by highway signs indicating "Edwards AFB" and "NASA-DRYDEN Flight Research Center"; (5) the base property line was marked by fences with steel posts and barbed wire; (6) there were signs on the fences that read: "Warning: U.S. Air Force Installation. It is unlawful to enter this area without permission of the Installation Commander. Sec. 21. Internal Security Act of 1950: 50 U.S.C. § 797. While on this installation all personnel and the property under their control are subject to search"; (7) the same sign was posted just before the guard gate where the incident occurred; and (8) since 1993, new FAA employees are routinely informed by an FAA Administrative Officer that they and their vehicles are subject to search at any time when they are present themselves at Edwards AFB or enter or leave the base. Based on the circumstances presented at the time of the incident, the district court did not err in concluding that Morgan had impliedly consented to the search. *See Morgan*, 323 F.3d at 782 ("As the Fourth Circuit noted, the 'circumstances [of a military base] combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base.'") (quoting *United States v. Jenkins*, 986 F.2d 76, 79 (4th Cir. 1993) (alteration in original)).

AFFIRMED.

GREG ALAN MORGAN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; WILLIAM COHEN, Former Secretary of Defense; UNITED STATES AIR FORCE; RICHARD REYNOLDS, General; EDWARD DE IULIO, Colonel; NEIL RADER, Colonel; C. ERIC BROUGHTON, Master Sergeant; KENNETH ERICHSEN, Master Sergeant; ERIC GOODSON, Airman, Defendants-Appellees.

No. 01-55471

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

323 F.3d 776; 2003 U.S. App. LEXIS 4833; 2003 Cal. Daily Op. Service 2387; 2003 Daily Journal DAR 3027

August 6, 2002, Argued and Submitted, Pasadena, California
March 18, 2003, Filed

COUNSEL: Melbourne B. Weddle and Sue Ann Howard, Law Offices of Melbourne B. Weddle, Santa Barbara, California, for the appellant.

Leon W. Weidman, John E. Nordin II, and Sara R. Robinson, United States Attorney's Office, for the appellee.

JUDGES: Before: Thomas G. Nelson, Richard A. Paez, and Richard C. Tallman, Circuit Judges. Opinion by Judge Tallman.

OPINION BY: Richard C. Tallman

OPINION:

TALLMAN, Circuit Judge:

As a matter of first impression in this Circuit, we must decide when a search conducted at the entry gate to a military base is reasonable. Because such installations

often warn of the possibility of search as a condition to entry, a warrantless search of a person seeking to enter a military base may be deemed reasonable based on the implied consent of the person searched. We remand to the district court to allow the development of a more complete factual record to determine whether implied consent was present here.

Greg Morgan was a civilian air traffic controller employed by the Federal Aviation Administration ("FAA") on Edwards Air Force Base (the "Base") in Kern County, California. Morgan alleges that on May 16, 1999, federal officers violated Morgan's Fourth Amendment rights when they conducted a suspicionless search of his vehicle at the entry gate to the Base. Morgan brought a *Bivens* claim, which the district court dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The district court based its dismissal on the closed nature of the active military Base,[1] but Morgan's Complaint contains no allegations as to the status of the installation. We hold that the district court could not dismiss Morgan's *Bivens* claim on the record then before it. We remand Morgan's claim so that the trial court may properly consider on a fully developed factual record whether he impliedly consented to the search. We affirm in a separately filed memorandum disposition the district court's rulings dismissing all other claims brought by Morgan.[2]

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[1] "Closed" in this context meaning not open to the public, as opposed to "nonoperational."

[2] Morgan raises several other issues on appeal, including the propriety of the dismissal of his section 1983 claims, and whether fees and costs should have been imposed on his attorney pursuant to Rule 11(c)(1)(A).

I

Morgan's Complaint alleges the following facts, which we regard as true, making all reasonable inferences in favor of Morgan. *See Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir. 2001). Morgan is a civilian employed by the FAA at the Base. He drove his wife's 1998 Jeep Cherokee to work on the morning of May 16, 1999. As was occasionally required, Morgan displayed his FAA identification badge at the entry gate to the Base. Instead of allowing Morgan to continue through the entry gate, however, Airman Eric Goodson, a Base security officer, instructed Morgan to stop his car on the side of the road. Morgan complied. Reading from a script on a clipboard, Goodson informed Morgan that he wished to search Morgan's vehicle and asked Morgan if he would consent to a vehicle search. Morgan refused, explaining that he did not want to be late for work.

Two other officers, Master Sergeants C. Eric Broughton and Kenneth Erichsen, then conferred with Goodson at the rear of Morgan's car. Broughton asked for Morgan's vehicle registration, driver's license, and insurance papers. All three officers then returned to the rear of the vehicle. Morgan concluded that he was going to be late for work. He got out of his car and walked toward the guard shack to telephone his employer. Broughton ordered Morgan to get back in his vehicle. Morgan asked if he was under arrest, to which Broughton responded, "No." Broughton then yelled, "Cover me." Erichsen and Goodson grasped the handles of their firearms, and Broughton handcuffed Morgan.

Broughton informed Morgan that he was not free to leave the location or move about freely. Broughton

searched Morgan's person and emptied the contents of Morgan's pockets. The three officers subsequently searched Morgan's Jeep and discovered an unloaded nine-millimeter semi-automatic pistol. Morgan was placed in a small locked room until the Kern County Sheriff's Department transported him to a local jail.

Morgan alleges that he was never informed of his constitutional rights or the charges against him, and was not provided with an attorney upon his request.

Ultimately, Morgan was charged under California Penal Code §§ 148(a) (resisting, delaying, or obstructing an officer), 12025(a) (carrying a concealed firearm), 12031(a) (carrying a loaded firearm), and California Vehicle Code § 14601.1(a) (driving when one's driving privilege is suspended or revoked). Although Morgan was prosecuted for the Penal Code violations, a Kern County Municipal Court commissioner later determined that there was no probable cause to search Morgan's vehicle or to initiate criminal proceedings against him. All state charges were subsequently dismissed.

Morgan then filed a civil rights action in the United States District Court for the Central District of California alleging twenty-five causes of action against the United States of America, the Department of Defense, the United States Air Force, Secretary of Defense William Cohen, Major General Richard Reynolds, Colonel Edward De Iulio, Lieutenant Colonel Neil Rader, Broughton, Erichsen, and Goodson.

The defendants moved to dismiss pursuant to Rule 12(b)(6). Facts not alleged in the Complaint were asserted in the motion papers, including an accompanying declaration from an Air Force officer. After the district court heard

oral argument from both parties, it dismissed all claims with prejudice. Morgan subsequently moved for reconsideration, attaching his own lengthy declaration of the factual events. The district court denied Morgan's motion for reconsideration.

II

Morgan seeks damages pursuant to *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), arguing that appellees violated his constitutional rights under the Fourth Amendment.[3]

Morgan claims the district court erred in dismissing his *Bivens* claim when it held that probable cause was not required to stop, search, and seize his vehicle on a closed military installation. We review the district court's dismissal of Morgan's action *de novo. See Vestar Dev. II, LLC v. General Dynamics Corp.,* 249 F.3d 958, 960 (9th Cir. 2001).

A

The United States, relying on *Branch v. Tunnell,* 937 F.2d 1382 (9th Cir. 1991), maintains that a heightened pleading standard should be applied in this case because the government asserted the defense of qualified immunity before the district court. *Branch* required application

[3] Morgan's Complaint names Air Force personnel Reynolds, De Iulio, Rader, Broughton, Erichsen, and Goodson in regard to this claim. To the extent Morgan's suit is against agents of the United States in their official capacities, his reliance on *Bivens* is misplaced. Morgan can only sue these officers in their individual capacities. *See Vaccaro v. Dobre,* 81 F.3d 854, 857 (9th Cir. 1996).

of a heightened pleading standard for complaints in which subjective intent is an element of the constitutional tort. *See Housley v. United States*, 35 F.3d 400, 401 (9th Cir. 1994). The government's argument is foreclosed by our recent decision in *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). In *Galbraith*, we overruled *Branch* on the basis of intervening Supreme Court precedent. *Id.* at 1125. Heightened pleading standards no longer apply to constitutional claims involving improper motives. The traditional Rule 12(b)(6) standards govern our analysis of Morgan's Complaint.

B

Morgan's Complaint sufficiently sets forth the elements of a *Bivens* claim by alleging a violation of his constitutional rights by agents acting under the color of federal law. Morgan alleges that his car was unreasonably searched in violation of the Fourth Amendment. Morgan also alleges that the defendants were acting under the color of federal law at the time of the search. Further, nothing in Morgan's Complaint admits of probable cause to conduct the search. Thus, dismissal under Rule 12(b)(6) was inappropriate.

C

But that does not end our inquiry. Because we are remanding this case to the district court for further development of the factual record to determine the propriety of dismissal, we consider under what circumstances the search of Morgan's car would satisfy the requirements of the Fourth Amendment. All of Morgan's *Bivens* claims depend upon the search's failure to comply with the Fourth Amendment.

The fundamental principle "of the Fourth Amendment[4] is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno,* 500 U.S. 248, 250, 114 L. Ed. 2d 297, 111 S. Ct. 1801 (1991) (footnote inserted and internal citation omitted). A search "conducted without a warrant is '*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" *United States v. Hawkins,* 249 F.3d 867, 872 (9th Cir. 2001) (quoting *Minnesota v. Dickerson,* 508 U.S. 366, 372, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993)). And "[w]hile the Fourth Amendment generally prohibits warrantless searches without probable cause, it is subject to a few narrow" exceptions. *United States v. Molina-Tarazon,* 279 F.3d 709, 712 (9th Cir. 2002). However, even where an exception to the probable cause rule is appropriate, the "irreducible constitutional requirement of reasonableness" still applies. *Id.*

A search not supported by probable cause may still be reasonable if the subject of the search consents to it. *Jimeno,* 500 U.S. at 252. Such consent may be express or implied. *Torbet v. United Airlines, Inc.,* 298 F.3d 1087, 1089 (9th Cir. 2002). Our sister circuits have applied the implied consent exception to the probable cause requirement in the context of searches on military bases. In *United States v. Ellis,* 547 F.2d 863 (5th Cir. 1977), the

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[4] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV (emphasis added).

Fifth Circuit considered a challenge to a search of a vehicle on a Naval Air Station. The *Ellis* court assumed that there was no probable cause for the search. *Id.* at 866. Even so, the court concluded that the search was reasonable because the defendant impliedly consented to have his car searched. *Id.* The Fifth Circuit stated that the defendant "certainly should have realized that his actions in presenting his vehicle to the guard at the entrance to the Air Station with an implied request to drive aboard carried the possibility of an inspection then and there." *Id.* The Fifth Circuit approved the search, holding that the "right to make a search pursuant to such consent does not turn on the presence of probable cause." *Id.*

The Fourth Circuit also examined the Fourth Amendment's application on military bases. In *United States v. Jenkins,* 986 F.2d 76 (4th Cir. 1993), the defendant argued that a search conducted on Andrews Air Force Base was without probable cause and therefore in violation of the Fourth Amendment. *Id.* at 78. The district court agreed with the defendant and suppressed the evidence seized during a search of the defendant's car. *Id.* The government appealed the district court's holding, arguing "that the district court erred by not recognizing an 'implied consent' exception to the requirement of probable cause for closed military bases." *Id.*

The Fourth Circuit agreed with the government and reversed. The court initially noted that "searches on closed military bases have long been exempt from the usual Fourth Amendment requirement of probable cause. The rationale is the same for why the base is closed in the first place: to protect a military installation that is vital to national security." *Id.* (citations omitted). The court then specifically approved the government's argument that

implied consent could obviate the probable cause requirement. The court held that:

> [T]he validity of [the defendant's] search [did not] turn on whether he gave his express consent to search as a condition of entering the base. Consent is implied by the totality of all the circumstances. The barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common-sense awareness of the nature of a military base – all these circumstances combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base.

Id. at 79 (internal quotation marks and citation omitted).

We also have previously recognized the implied consent exception to the probable cause requirement, although not in the context of searches on military installations. In *Torbet,* an airline passenger filed a 42 U.S.C. § 1983 action alleging that he was subjected to a suspicionless search. 298 F.3d at 1088. We held that an airline passenger "impliedly consented to the random search by placing his bag on the x-ray conveyor belt," regardless of whether the x-ray revealed any suspicious contents. *Id.* at 1089.

We now join the Fourth and Fifth Circuits and hold that a person may impliedly consent to a search on a military base. As the Fourth Circuit noted, the "circumstances [of a military base] combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base." *Jenkins,* 986 F.2d at 79. Our holding in *Torbet* supports our conclusion. A person presenting himself at a military gate is similar to a person presenting himself at a security checkpoint at an airport,

and in both situations there may be implied consent for a search.[5]

D

In dismissing Morgan's claim, the district court suggested that probable cause was not needed to search Morgan's car because the search occurred on a closed military base. The district court's reasoning goes too far in allowing a categorical exception to the probable cause rule for all searches on closed military bases. While the district court was correct that probable cause may not be needed in this case, the probable cause requirement is only obviated if the defendant impliedly consented to the search. The bare facts alleged in Morgan's Complaint do not allow a determination of whether he impliedly consented to the search. Therefore, the district court's Rule 12(b)(6) dismissal of Morgan's *Bivens* claim is reversed, and that claim alone is remanded to the district court for further proceedings on a more complete factual record.

AFFIRMED in Part; **REVERSED** in Part; and **REMANDED.** Each party shall bear its own costs.

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[5] Our decision today was anticipated somewhat by our opinion in *United States v. Banks*, 539 F.2d 14 (9th Cir. 1976), in which we noted that authority existed "for the proposition that a civilian is subject to search and arrest by military authorities without probable cause or his consent on a 'closed' military base," but declined to address that specific issue. *Id.* at 16 n. 3.

GREG ALLAN MORGAN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; WILLIAM COHEN, Former Secretary of Defense; UNITED STATES AIR FORCE; RICHARD REYNOLDS, General; EDWARD DE IULIO, Colonel; NEIL RADER, Colonel; C. ERIC BROUGHTON, Master Sergeant; KENNETH ERICHSEN, Master Sergeant; ERIC GOODSON, Airman, Defendants-Appellees.

No. 01-55471

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

60 Fed. Appx. 180; 2003 U.S. App. LEXIS 4978

August 6, 2002, Argued and Submitted,
Pasadena, California
March 18, 2003, Filed

COUNSEL: For GREG ALLAN MORGAN, Plaintiff-Appellant: Melbourne B. Weddle, Esq., Santa Barbara, CA.

For UNITED STATES OF AMERICA, WILLIAM COHEN, UNITED STATES AIR FORCE, RICHARD REYNOLDS, EDWARD DEIULIO, NEIL RADER, C. ERIC BROUGHTON, KENNETH ERICHSEN, ERIC GOODSON, Defendants-Appellees: John E. Nordin, II, Esq., Sara R. Robinson, AUSA, USLA – OFFICE OF THE U.S. ATTORNEY, Los Angeles, CA.

JUDGES: Before: T.G. NELSON, PAEZ, and TALLMAN, Circuit Judges.

OPINION: MEMORANDUM*

Before: T.G. NELSON, PAEZ, and TALLMAN, Circuit Judges.

Greg Morgan, a civilian employed as an air traffic controller by the Federal Aviation Administration on Edwards Air Force Base (the "Base"), appeals the district court's Rule 12(b)(6) dismissal of his 42 U.S.C. § 1983 claims alleging that federal officers, their supervisors, and governmental entities violated his Fourth Amendment rights by searching his vehicle at the entry gate to the Base.[1] Morgan also asserts a Federal Torts Claim Act violation, appeals the district court's order dismissing his federal and state eavesdropping claims, and contends the district court erred in sanctioning his counsel.

We affirm the district court in every respect, except with regard to the court's dismissal of the *Bivens* claim.[2]

I

Morgan asserts in his brief that Master Sergeant C. Eric Broughton was acting under color of state law as an off-duty California peace officer when Broughton arrested Morgan and allegedly violated Morgan's constitutional

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] Morgan failed to properly present his 42 U.S.C. § 1985(1) & (3) claims on appeal. Both claims are therefore deemed waived. *See Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404-05 (9th Cir. 1985).

[2] We reverse the dismissal of Morgan's *Bivens* claim in a separate published opinion filed today.

rights, thereby giving rise to a claim based on 42 U.S.C. § 1983.[3] Yet, Morgan's Complaint alleged only that Broughton "was and is at all times relevant herein, a member and/or employee of Defendant AIR FORCE, of Edwards Air Force Base." The Complaint never alleged Broughton's status as both a federal and local employee. Consequently, Morgan's Complaint failed to state a cause of action under section 1983, which requires action under the color of state law. Accordingly, the district court did not abuse its discretion in denying Morgan's motion for "reconsideration" of this issue. *See Kona Enters., Inc. v. Estate of Bishop,* 229 F.3d 877, 883 (9th Cir. 2000).

Similarly, Morgan's allegation on appeal that Broughton conspired or acted in concert with state officials to deprive Morgan of his civil rights is without merit.[4] Federal officers acting within the course and scope of their Base security duties initiated the law enforcement activities at issue. The federal officers notified the Kern County Sheriff's Department that Morgan needed to be taken into custody for booking. Because the county officers were acting at the bequest of federal agents, if they were acting jointly, it was under federal law. *See Billings v. United States,* 57 F.3d 797, 801 (9th Cir. 1995). Section 1983 does not provide a cause of action against federal officers acting under color of federal law. *See id.* The district court properly dismissed this portion of Morgan's civil rights claim.

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[3] Contrary to the government's contention, Morgan raised this issue in his motion for reconsideration, and thus it has not been waived. *See Whittaker Corp. v. Execuair Corp.,* 953 F.2d 510, 515 (9th Cir. 1992).

[4] While Morgan's Complaint names defendants Broughton, Erichsen, and Goodson in connection to this claim, Morgan's appeal implicates only Broughton.

II

Morgan claims that his arrest gives rise to a claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). This claim was not raised in the Complaint and is presented for the first time on appeal. It is waived and we do not consider it. *See Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001).

III

Morgan contends that Broughton violated 18 U.S.C. § 2511 and California Penal Code § 632 when Broughton tape-recorded Morgan's conversation with the federal officers. Pursuant to section 2511(2)(c) & (d), Broughton could lawfully intercept the oral communication because he was a party to the communication he recorded. Thus, no "eavesdropping" occurred within the meaning of section 2511. *Cf. Lopez v. United States,* 373 U.S. 427, 439, 10 L. Ed. 2d 462, 83 S. Ct. 1381 (1963) (holding, in the Fourth Amendment context, that the use of recording device was not eavesdropping because the government agent was a party to the conversation).

We also affirm the dismissal of Morgan's claim based on California Penal Code § 632. That statute specifically allows the recording of public conversations that may be reasonably expected to be overheard. Cal. Penal Code § 632(c). Morgan's Complaint alleges a conversation in a public area that would be reasonably expected to be overheard.

IV

Morgan claims the district court erred by awarding costs and fees incurred by the government in opposing the frivolous Rule 11 motion filed by his attorney. The evidence supports the district court's imposition of fees and costs under Rule 11(c)(1)(A). There was no abuse of discretion. *See Christian v. Mattel, Inc.*, 286 F.3d 1118, 1126, 1131-32 (9th Cir. 2002).

AFFIRMED in Part; **REVERSED** in Part; and **REMANDED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALLEN MORGAN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON, as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC GOODSON, as an individual and in his capacity as Airman, USAF; and DOES 1 through 10, inclusive.

Defendants.

CV 00-5221 RSWL (RCx)

ORDER

(Filed Feb. 27, 2004)

Before the Court is Plaintiff's Motion Pursuant to Rule 59 Amending the Findings, Conclusions, and Judgment in CV 00-5221 and CV 03-2372. The matter was scheduled to be heard by this Court on February 2, 2004, but was taken off calendar pursuant to Rule 78 of the Federal Rules of Civil Procedure for disposition based on the papers filed. After consideration of the papers filed in this matter, this Court rules as follows on issues associated with CV 00-5221.

Pursuant to Rule 59(e), the Court amends its December 23, 2003 Findings of Uncontroverted Fact and Conclusions of Law, deleting the third conclusion of law which provided that Plaintiff failed to exhaust his administrative remedies under the Federal Tort Claims Act ("FTCA"). This conclusion is inappropriate here because Plaintiff did not bring any claims under the FTCA in this case.

Plaintiff, however, has failed to demonstrate any other reason to modify the Findings of Uncontroverted Fact and Conclusions of Law. Plaintiff argues for the first time in this motion that the day of the incident was his day off; thus, the Court need not consider this argument. *See Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995).

But if this Court considered the argument, in light of the multitude of evidence supporting the conclusion that Plaintiff was going to work, Plaintiff's new evidence fails to create a genuine issue of material fact that he was on his day off. Thus, Plaintiff's claim is covered by FECA and this Court lacks subject matter jurisdiction.

But even if this Court has subject matter jurisdiction, Plaintiff's claims fail for the reasons set forth in the

Amended Findings of Uncontroverted Fact and Conclusions of Law filed in CV 00-5221 on this day.

IT IS SO ORDERED.

DATED: 2-27-04

RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALLEN MORGAN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON, as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC GOODSON, as an individual and in his capacity as Airman, USAF; and DOES 1 through 10, inclusive.

Defendants.

CV 00-5221 RSWL (RCx)

AMENDED FINDINGS OF UNCONTROVERTED FACT AND CONCLUSIONS OF LAW

(Filed Feb. 27, 2004)

After consideration of the papers in support of and in opposition to Defendants' Motions for Summary Adjudication, the court makes the following findings of uncontroverted fact and conclusions of law.

UNCONTROVERTED FACTS

1. Plaintiff is a civilian employed by the Federal Aviation Administration ("FAA") who worked at Edwards Air Force Base ("Edwards AFB").

2. On May 15, 2000, Plaintiff filed a Complaint with twenty-five causes of action against the United States, the Department of Defense, the Air Force, William Cohen (in his capacity as Secretary of the Department of Defense), and various officers in their individual and official capacities. Plaintiff alleged violations of 42 U.S.C. §1983, 42 U.S.C. §1985(1) and (3), *Bivens*[1], and eavesdropping in violation of 18 U.S.C. §2511 and California Penal Code § 632.

3. Plaintiff alleged that on May 16, 1999, federal officers, their supervisors, and governmental entities violated his constitutional rights by searching his vehicle, detaining him, arresting him, and impermissibly eavesdropping on him at the entry gate to the base.

4. This court's order, dismissing the Complaint with prejudice pursuant to FRCP 12(b)(6), was entered on November 15, 2000.

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[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

5. On appeal, the Ninth Circuit affirmed this court's ruling "in every respect, except with regard to the court's dismissal of the *Bivens* claim."

6. At the time of the incident, Edwards AFB was a closed base, meaning it was not open to the public.

7. Plaintiff was transferred to the FAA's High Desert Terminal Radar Approach Control center ("TRACON") at Edwards AFB at or around August 30, 1998.

8. He was transferred from a TRACON on another Air Force Base near Tucson, Arizona.

9. From the time Plaintiff was assigned to Edwards AFB until the incident on May 16, 1999, he regularly commuted from the Palmdale and Lancaster areas to the west entry gate of Edwards AFB.

10. The exit from California State Highway 14 on Plaintiff's regular route was dominated by highway signs indicating "Edwards AFB" and "NASA-DRYDEN Flight Research Center. . . . "

11. Once Plaintiff passed the Edwards AFB property line, he would have passed a 15 by 8 foot sign which stated: "WELCOME TO EDWARDS AFB home of the UNITED STATES PREMIER FLIGHT TEST/RESEARCH FACILITY."

12. The Base property line was marked by fences with steel posts and barbed wire.

13. Signs sized 15 by 18 inches were posted on the fences and read: "WARNING: U.S. Air Force Installation. It is unlawful to enter this area without permission of the Installation Commander. Sec. 21. Internal Security Act of

1950: 50 U.S.C. § 797. While on this installation all personnel and the property under their control are subject to search."

14. In addition to the signs posted on the fences, on the left side of the road there was a larger sign (approximately 36 by 32 inches) with the same warning and an additional statement that "This area is patrolled by military working dog teams."

15. Just before the guard gate where the incident occurred on the right side of the road was a white sign approximately 36 by 32 inches with red and black lettering that also read: "WARNING: U.S. Air Force Installation. It is unlawful to enter this area without permission of the Installation Commander. Sec. 21. Internal Security Act of 1950: 50 U.S.C. § 797. While on this installation all personnel and the property under their control are subject to search."

16. The guard gate was located well inside the perimeter of Edwards AFB in a desolate area. The configuration of the guard gate clearly would have suggested to any reasonable individual that it was a secured entrance.

17. Beyond the guard gate, there were other items indicative of a military base such as signs warning motorists they were adjacent to a firing range, military aircraft, airplane hangers, and other facilities.

18. All the guard gates at Edwards AFB were staffed 24 hours a day, 365 days a year with Air Force Security Force members.

19. The Security Forces that guard the gate were uniformed and armed with loaded weapons at all times. The Security Forces wore what the Defendants who were

at the scene in this case were wearing: a battle dress utility ("BDU") uniform, a black nylon equipment belt that includes a holster, a loaded 9 millimeter Barreta handgun, a spare magazine, and handcuffs. On the left side of their chests they wore Air Force Security Force cloth badges and an Air Force patch, and on the right side of their chests, they wore a patch bearing their names.

20. Prior to May 16, 1999, Plaintiff had routinely been stopped at the guard gate and asked for identification.

21. Since 1993, new FAA employees have been orientated routinely by an FAA Administrative Officer who informs them that Edwards AFB security has the right to search them and their vehicles at any time when they are present at the Edwards AFB or enter or leave the Edwards AFB.

22. FAA personnel also are told routinely that they are subject to search by and the orders of the military authorities when they are on the Edwards AFB and that it is their duty as FAA personnel to comply with Security Force personnel.

CONCLUSIONS OF LAW

1. Plaintiff has an exclusive remedy for his injuries under the Federal Employee Compensation Act ("FECA"). Thus, this court has no subject matter jurisdiction over any of his claims against the United States and its instrumentalities. *See Moe v. United States,* 326 F.3d 1065, 1068 (9th Cir. 2003).

2. The instrumentalities of the United States in this suit are the Department of Defense, the Air Force, and the

individual Defendants sued in their official capacity. *See Gnotta v. United States,* 415 F.2d 1271, 1277 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970).

3. Even if this court has subject matter jurisdiction, all claims in the first amended complaint, except the *Bivens* claim the Ninth Circuit remanded, are barred by the doctrines of res judicata and the law of mandate.

4. All claims in the first amended complaint that were originally alleged and then dismissed, except the *Bivens* claim the Ninth Circuit remanded, also are barred by the law of the case and res judicata.

5. Even if the court has subject matter jurisdiction, all the claims against supervisors such as William Cohen, General Richard Reynolds, Colonel Edward Deiulio, and Colonel Neil Rader fail because these individuals cannot be held liable under respondeat superior for violations of 42 U.S.C. § 1983 or *Bivens* claims. *See Terrell v. Brewer,* 935 F.2d 1015, 1018 (9th Cir. 1991); *Redman v. County of San Diego,* 942 F.2d 1435, 1446 (9th Cir. 1991).

6. And to the extent Plaintiff attempts to hold the supervisors liable for their personal actions, Plaintiff has failed to establish a causal connection between any supervisory act and the alleged constitutional violations. *See Sanders v. Kennedy,* 794 F.2d 478, 483-484 (9th Cir. 1986).

7. The three individual officers at the May 16, 1999 incident (C. Eric Broughton, Kenneth Erichsen, and Eric Goodson) also are shielded from suit for all their alleged actions by qualified immunity. The officers were performing discretionary functions and did not violate any clearly established statutory or constitutional rights.

8. But even if the court has subject matter jurisdiction over the remanded *Bivens* claim and Defendants do not enjoy qualified immunity, Defendants did not violate Plaintiff's Constitutional rights because no genuine issue of material fact exists as to whether Plaintiff impliedly consented to the search. The totality of the circumstances punctured any reasonable expectation of privacy that Plaintiff might have had. Thus, Plaintiff impliedly consented to the search and his Fourth Amendment rights were not violated. *See Morgan v. United States of America,* 323 F.3d 776, 782 (9th Cir. 2003); *United States v. Jenkins,* 986 F.2d 76, 79 (4th Cir. 1993). Defendants are entitled to prevail as a matter of law on the *Bivens* claim remanded by the Ninth Circuit.

9. Finally, Defendants are not liable for damages under the theories alleged because no genuine issue of material fact exists concerning whether Plaintiff sustained any damages as a result of the alleged actions. He did not.

10. Defendants are entitled to prevail as a matter of law on all claims.

IT IS SO ORDERED.

DATED: 2-27-04

RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALLEN MORGAN, Plaintiff, v. THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON, as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC GOODSON, as an individual and in his capacity as Airman, USAF; and DOES 1 through 10, inclusive. Defendants.	CV 00-5221 RSWL (RCx) **AMENDED ORDER** (Filed Feb. 27, 2004)

Before the Court are Defendants' two motions for summary adjudication and Plaintiff's motion pursuant to Rule 12(f), striking Defendants' Rule 8(b) answers to the first amended complaint. After a hearing in this Court on December 22, 2003 and consideration of the papers and argument submitted, this Court rules as follows.

In his opposition papers, Plaintiff requests relief pursuant to Rule 56(f). Plaintiff has failed utterly to make a good faith showing that any form of relief, including the continuance Plaintiff requests, would result in the discovery of facts essential to preclude the grant of Defendants' motions for summary adjudication. Defendants' motions are not premature. This Court **DENIES** Plaintiff's request under Rule 56(f).

This Court **GRANTS** Defendants' two motions for summary adjudication on all claims against all Defendants for the reasons stated in the Findings of Uncontroverted Fact and Conclusions of Law adopted by this Court on this same day.

Because this order disposes of all of Plaintiff's claims, this Court finds Plaintiff's motion pursuant to Rule 12(f) **MOOT.**

IT IS SO ORDERED.

DATED: 2-27-04

RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALLEN MORGAN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON, as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC GOODSON, as an individual and in his capacity as Airman, USAF; and DOES 1 through 10, inclusive.

Defendants.

CV 00-5221 RSWL (RCx)

AMENDED JUDGMENT

(Filed Feb. 27, 2004)

This court granted Defendants' motions for summary adjudication on December 22, 2003 on all claims, against all Defendants. Thus, judgement is hereby entered dismissing Plaintiff Greg Allen Morgan's claims against Defendants with prejudice.

IT IS SO ORDERED.

DATED: 2-27-04

RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

Sue Ann Howard, Esq. # 164265
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Attorney for Plaintiff Greg Alan Morgan

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREG ALAN MORGAN, **Plaintiff,** **vs.** **THE UNITED STATES OF AMERICA, et al.,** **Defendants**	**Case No.: CV 00-5221 RSWL (RCx)** **~~[PROPOSED]~~ ORDER GRANTING PLAINTIFF'S EX PARTE APPLICATION FOR AN ORDER REQUIRING DEFENDANTS TO RETURN THE DEPOSITION TRANSCRIPTS OF DEFENDANTS BRAD GOODSON AND C. ERIC BROUGHTON** (Filed Feb. 2, 2004)

[DENIED]

Based upon the *ex-parte* application,

IT IS ORDERED, Defendants shall transmit the Deposition Transcripts of Brad Goodson and C. Eric Broughton to the Offices of Counsel for Plaintiff located at 44421 10th Street West, Suite H, Lancaster, CA 93534, by overnight service within 48 hours after this order is granted.

IT IS FURTHER ORDERED, In the event Counsel for Defendants does not produce the Deposition Transcripts of Brad Goodson and C. Eric Broughton as stated above, Defendants shall pay the sum of three times the original cost in the amount of six thousand sixteen dollars and fifty cents ($6016.50), payable to Plaintiff as reasonable costs and fees, and shall so advise Plaintiff of their inability to transmit said Deposition Transcripts within 48 hours after this order is granted.

DATED: January 2, 2004

/s/ [Illegible]
~~RONALD S.W. LEW~~
United States ~~District Court~~
Magistrate Judge

Presented by,

/s/ Sue Ann Howard
Sue Ann Howard
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALAN MORGAN PLAINTIFF(S), v. THE UNITED STATES OF AMERICA, et al. DEFENDANT(S)	CASE NUMBER CV 00-5221-RSWL(RCx) ORDER STRIKING FILED DOCUMENT FROM THE RECORD (Filed Dec. 15, 2003)

WHEREAS, the document listed below was improperly filed for the following reason:

Pursuant to Local Rule 7-11, motions hearing date "may" be continued with stipulation of parties. No such stipulation being submitted nor has the Court ordered such a continuation.

IT IS HEREBY ORDERED that the documents shall be stricken from the record and shall not be considered by the Court:

Document Entitled: Pltf Greg Morgan's Notice of Motion and Motion to Strike Defts' Answers to the First Amended Complaint (Amended for Change of Hearing Date).

IT IS FURTHER ORDERED that the documents shall not be returned to the filing party; however, the Clerk shall note on the case docket that the documents are stricken from the record.

DATED: 12-15-03

RONALD S.W. LEW
United States District Judge

cc: Appeals Department
Pro Se Department

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

CASE NO. CV 00-5221-RSWL DATED: October 6, 2003

TITLE: GREG ALLAN MORGAN v. U.S.A.

PRESENT: HONORABLE RONALD S.W. LEW, JUDGE

Kelly Davis	Not Present
Court Clerk	Court Reporter

ATTORNEYS FOR PLAINTIFFS:

ATTORNEYS FOR DEFENDANTS:

Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS)

Pltf's Motion for Order and Certification by District Court is **DENIED AS MOOT**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALLEN MORGAN, Plaintiff, v. THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON, as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC GOODSON, as an individual and in his capacity as Airman, USAF; and DOES 1 through 10, inclusive. Defendants.	CV 00-5221 RSWL **ORDER** (Filed Oct. 3, 2003)

Before the Court is Plaintiff's motion for leave to file a first amended complaint pursuant to Federal Rule of Civil Procedure 15(a). The Court finds justice requires granting the motion and thus, **GRANTS** the motion.

IT IS SO ORDERED.

DATED: 10-3-03

RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALAN MORGAN PLAINTIFF(S), v. THE UNITED STATES OF AMERICA, et al. DEFENDANT(S)	CASE NUMBER CV 00-5221-RSWL(BQRx) ORDER STRIKING FILED DOCUMENTS FROM THE RECORD (Filed Aug. 28, 2003)

WHEREAS, the document listed below was improperly filed for the following reason:

On May 2, 2003, plaintiff counsel **attempted** to file a First Amended Complaint, which was properly discrepancied at the Intake Window. On June 9, 2003, plaintiff filed a First Amended Complaint, without leave of the Court.

IT IS HEREBY ORDERED that the First Amended Complaint shall be stricken from the record and shall not be considered by the Court:

Other: Defendant USA's Motion to Strike and Dismiss First Amended Complaint set for September 15, 2003, is withdrawn and taken off calendar by the Court.

IT IS FURTHER ORDERED that the documents shall not be returned to the filing party; however, the Clerk shall note on the case docket that the documents are stricken from the record.

DATED: Aug 28, 2003

RONALD S.W. LEW
United States District Judge/
Magistrate Judge

cc: Appeals Department
Pro Se Department

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE RONALD S.W. LEW, JUDGE PRESIDING

GREG MORGAN, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	**CERTIFIED COPY** No. CV 00-5221

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION
Los Angeles, California
Monday, June 9, 2003

* * *

[5] MR. NORDIN: We have not yet answered on behalf of the three Biven's defendants who remain in the case.

THE COURT: Have they been served?

MR. NORDIN: Excuse me?

THE COURT: Have they been served? Okay. I asked a question, but you have to determine whether or not all the people have been properly served, and get the answers properly filed. The discovery dates remain. You ought to get this action going.

MR. NORDIN: We'll do that. If I may file an appropriate response, it will be an answer, of course, within 30 days. I'm going to be out of town for much of the next three weeks is why I ask for so much time.

THE COURT: How do we know if they have been served?

MR. NORDIN: We'll find out and address the matter by then.

THE COURT: You talk to counsel. You talk to counsel.

MR. NORDIN: Very well.

THE COURT: Thank you.

MS. HOWARD: One more thing, Your Honor. [6] Sorry. We were here for today on a discrepancy. We tried to file a first amended complaint, and the clerk would not take it because they hadn't received a hard copy for the remand from the Ninth Circuit. They still wouldn't take it, and we would like to file a first amended complaint.

THE COURT: Has there been an answer?

MS. HOWARD: No.

THE COURT: By anyone?

MS. HOWARD: No.

THE COURT: None of the Biven's defendants have been served?

MS. HOWARD: No, they have been served. We have a first amended complaint we would like to file.

THE COURT: Have any of the Biven's defendants answered?

MS. HOWARD: No, Your Honor.

THE COURT: It should be filed with the court.

MS. HOWARD: We'll do that. Thank you so much.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTES – APPEALS

Case No. CV 00-5221-RSWL Date: May 19, 2003
Court of Appeals No. 01-55471

Title: GREG ALLAN MORGAN v. U.S.A., et al.

PRESENT: HONORABLE RONALD S.W. LEW

Kelly Davis Court Clerk	Not present Court Reporter
ATTORNEY FOR PLAINTIFF:	ATTORNEY FOR DEFENDANT:
Not present	Not present

PROCEEDINGS: FILING AND SPREADING MANDATE OF THE NINTH CIRCUIT COURT OF APPEALS

___ IN COURT _X_ IN CHAMBERS (No hearing necessary)
_X_ COUNSEL NOTIFIED

The Court ORDERS that the mandate of the Ninth Circuit Court of Appeals:

____ Affirming ____ Remanding ____ Reversing and Remanding
XX Affirming in part, Reversing in part and REMANDED
____ Dismissing Appeal
____ Other: _____

is hereby filed and spread upon the minutes of this District Court.

XX This case is set for status conference on June 9, 2003 at 9:00 am. The Court's address is 312 N. Spring Street, Fifth Floor, Los Angeles, CA. 90012. This Court will also address the issue of the Notice of Document Discrepancy regarding the attempted filing of the First Amended Complaint.

(ENTERED MAY 20 2003) X **MAKE JS-5**

MINUTE FORM CV 48 Initials of Deputy Clerk KD
MINUTES – APPEALS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF DOCUMENT DISCREPANCIES

(Filed Aug. 28, 2003)

To: ☒ U.S. District Judge/
☐ U.S. Magistrate Judge Lew

From: M Martinez, Deputy Clerk

Date Received: 5/2/03

Case No.: CV00-5221 Case Title: Morgan v The USA

Document Entitled: (P) 1st Amended Complaint

Upon the submission of the attached document(s), it was noted that the following discrepancies exist:

☐ Local Rule 11-3.1	Document not legible
☐ Local Rule 11-3.8	Lacking name, address, phone number
☐ Local Rule 11-4.1	No copy provided for judge
☐ Local Rule 19-1	Complaint/Petition includes more than ten (10) Does or fictitiously named parties
☐ Local Rule 15-1	Proposed amended pleading not under separate cover
☐ Local Rule 11-6	Memorandum/brief exceeds 25 pages
☐ Local Rule 11-8	Memorandum/brief exceeding 10 pages shall contain table of contents
☐ Local Rule 83-1.5	No Certification of Interested Parties and/or no copies
☐ Local Rule ~~7-3~~ 6.1	Written notice of motion lacking or timeliness of notice incorrect
☐ Local Rule 56-1	Statement of uncontroverted facts and/or proposed judgment lacking

☐ Local Rule 56-2	Statement of genuine issues of material fact lacking
☐ Local Rule 7-19.1	Notice to other parties of ex parte application lacking
☐ Local Rule 16-6	Pretrial conference order not signed by all counsel
☐ FRCvP Rule 5(d)	No proof of service attached to document(s)

☒ Other: Case Termed 11/15/00. Appeal filed 3/5/01 No CCAP Order has not been filed & spread. Case has never been reopened

Note: Please refer to the court's Internet website at www.cacd.uscourts.gov for local rules and applicable forms.

ORDER OF THE JUDGE/MAGISTRATE JUDGE

IT IS HEREBY ORDERED:

☐ The document is to be filed and processed. The filing date is ORDERED to be the date the document was [illegible] "received but not filed" with the Clerk. Counsel* is advised that any further failure to comply with the Local Rules may lead to penalties pursuant to Local Rule 83-7.

_____ _____

Date U.S. District/Magistrate Judge

☒ The document is **NOT** to be filed, but instead **REJECTED**, and is ORDERED returned to *counsel. *Counsel shall immediately notify, in writing, all parties previously served with the attached documents

---

* The term "counsel" as used herein also includes any pro se party. See Local Rule 1-3.

that said documents have not been filed with the Court.

8-28-03 /s/ Ronald S.W. Lew
Date U.S. District/Magistrate Judge

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United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
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JOHN E. NORDIN II (SBN 049680)
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Attorneys for Defendants,
United States of America, et al.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREG ALLAN MORGAN, Plaintiff, v. UNITED STATES OF AMERICA et al., Defendants.	No. CV. 00-5221-RSWL(BQRx) ~~[Proposed]~~ ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (Filed Jan. 25 2001)

The motion for reconsideration filed on behalf of plaintiff Greg Allan Morgan, came on regularly for hearing on January 8, 2001. Plaintiff appeared through his counsel, Sue Ann Howard, Esq., and defendants appeared

through the United States Attorney for the Central District of California, by John E. Nordin II, Assistant United States Attorney, Assistant Chief, Civil Division. The Court having had sufficient time to consider the moving papers, the opposition papers, plaintiff's *ex-parte* application and the opposition thereto, as well as the arguments of plaintiff's counsel, made the following findings and order:

(1) Plaintiff brought the instant motion pursuant to Fed.R.Civ.P. 59(e) and Local Rule 7.16. Plaintiff argues that the Court committed obvious error in granting Defendants' Motion to Dismiss the Action, embodied in the Order Dismissing the Action With Prejudice, entered November 16, 2000. Plaintiff also proffered new theories and evidence in the motion for reconsideration.

(2) Plaintiff has not demonstrated the existence of new facts or law which were not known to plaintiff, or which could not have been known had reasonable diligence been exercised prior to the hearing of the motion to dismiss. Nor has plaintiff shown that this court manifestly failed to consider the facts and law presented. Plaintiff has shown no basis for granting the motion for reconsideration under Fed.R.Civ.P 59(e), Local Rule 7.16, or under any other provision of law. The Court considered all arguments raised by plaintiff and determined motion should be denied.[1]

---

[1] The Court noted that plaintiff has filed a motion seeking sanctions against defendants and their attorneys. Plaintiff may wish to consider whether such motion should be withdrawn in light of the Court's ruling on the motion for reconsideration.

Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's motion for reconsideration of the order dismissing action with prejudice, entered November 16, 2000, is denied. Said order of dismissal remains in effect.

DATED: January 25, 2001.

/s/ Ronald S.W. Lew
RONALD S.W. LEW
United States District Judge

Presented by:

ALEJANDRO N. MAYORKAS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief Civil Division

/s/ John E. Nordin II
JOHN E. NORDIN II
Assistant United States Attorney
Assistant Chief, Civil Division
Attorneys for defendants
United States of America, et al.

ALEJANDRO N. MAYORKAS
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Attorneys for Defendants,
United States of America, et al.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GREG ALLAN MORGAN, Plaintiff, v. UNITED STATES OF AMERICA et al., Defendants.	No. CV. 00-5221-RSWL (BQRx) ~~[Proposed]~~ ORDER DISMISSING ACTION WITH PREJUDICE (Filed Nov. 15 2000)

The motion to dismiss the action filed on behalf of defendants, the United States of America, Secretary of Defense William Cohen, the United States Air Force, General Richard Reynolds, Colonel Edward Deiulio,

Colonel Neil Rader, MSgt. C. Eric Broughton, MSgt. Kenneth Erichsen, and Airman Eric Goodson, on September 14, 2000, came on regularly for hearing on October 30, 2000. Plaintiff appeared through his counsel, Sue Ann Howard, Esq., and defendants appeared through the United States Attorney for the Central District of California, by John E. Nordin II, Assistant U.S. Attorney, Assistant Chief, Civil Division. Also present on behalf of defendants was Capt. Dina L. Bernstein, AFLSA/JACL, Air Force General Litigation Division, Rosslyn, VA. Based upon the moving and opposition papers, and all other documents filed herein, as well as the arguments of plaintiff's counsel, the Court makes the following findings and order:

(1) The complaint does not allege that the defendants conspired with or acted in concert with state officials, accordingly, the first through eighth causes of action based upon 42 U.S.C. § 1983 are dismissed pursuant to Rule 12(b)(6).

(2) The court is not required to accept the conclusory allegations that plaintiff was deprived of his constitutional rights because of his discharge of his alleged official and regulatory duties as an alleged officer of the FAA. Plaintiff has not alleged facts sufficient to support such an allegation. Accordingly, the ninth through twelfth causes of action based upon 42 U.S.C. § 1985(1) are dismissed pursuant to Rule 12(b)(6).

(3) Plaintiff has not alleged any racial or any other invidious, class-based discrimination, and thus has not stated a claim under 42 U.S.C. § 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct 1790, 29 L.Ed.2d 338 (1971). Accordingly, the thirteenth through

the sixteenth causes of action are dismissed pursuant to Rule 12(b)(6).

(4) As Edwards Air Force Base is a closed base, the defendants were not required to have probable cause to stop, inspect and/or search plaintiff and his vehicle, or to detain, and arrest the plaintiff. Plaintiff's constitutional tort or *Bivens* claims (*Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)), are based upon the assertion that defendants' actions were undertaken without probable cause. Accordingly, the seventeenth through the twenty-fourth causes of action are dismissed pursuant to Rule 12(b)(6).

(5) Plaintiff has not stated a claim based upon eavesdropping or the making of a tape recording. Accordingly, the twenty-fifth cause of action is dismissed pursuant to Rule 12(b)(6).

(6) It does not appear that plaintiff could state a claim upon which relief could be granted if allowed to amend. Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that this action is dismissed with prejudice.

DATED: November 15, 2000.

/s/ RONALD S W LEW
RONALD S.W. LEW
United States District Judge

Presented by:

ALEJANDRO N. MAYORKAS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief Civil Division

/s/ John E. Nordin II
JOHN E. NORDIN II
Assistant United States Attorney
Assistant Chief, Civil Division
Attorneys for defendants
United States of America, et al.

IN THE SUPERIOR COURT,
EAST DIVISION,
MOJAVE BRANCH
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

CASE NO. MM036748A

DECISION
PEOPLE V. MORGAN

The sole issue before the Court is whether the warning sign at the entrance of Edwards Air Force Base justified the search a car of a civilian employee. The People contend that it did, as a matter of implied consent upon entering the Base. The Defendant contends that it did not after expressly denying consent to search.

It is stipulated that there was no probable cause. 50 U.S.C. 727 provides that it is a Federal misdemeanor to violate the regulation or order of the Secretary of Defense or his delegated military commander. The military commander of the Base evidently promulgated the rule that all vehicles entering the Base are subject to search. The Court accepts that he has valid security reasons to do so. This justifies an administrative search, not a probable cause search.

Neither side cited authority whether an implied consent can be overridden by an expressed refusal. The Mathis case does not go to the issue. The Court is finding that at the entrance, at least, an express refusal to allow a search negates an implied consent. The circumstances at the entrance dictate that persons be allowed to leave as an alternative to the administrative search. This was the reasoning of the Estes case. The circumstances would be different if the vehicle had passed the entrance. The

regulations must provide the least intrusive invasion of privacy to accomplish the administrative goal.

Defendant's motion is granted.

/s/ David L. Eckert 9/23/99
David L. Eckert, Commissioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREG ALAN MORGAN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 04-55758 D.C. No. CV-03-02372-RSWL Central District of California, Los Angeles ORDER
GREG ALAN MORGAN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendants-Appellees.	No. 04-55761 D.C. No. CV-00-05221-RSWL Central District of California, Los Angeles (Filed Apr. 19, 2006)

Before: T.G. NELSON, PAEZ, and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Paez and Tallman have voted to deny the petition for rehearing en banc and Judge Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATE DISTRICT COURT
THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREG ALLAN MORGAN Plaintiff vs. UNITED STATES OF AMERICA et al. Defendants	No. 00-5221-RSWL(BQRx) **NOTICE OF APPEAL** (Filed Mar. 7, 2001)

NOTICE OF APPEAL

NOTICE OF APPEAL is given that Greg Allan Morgan, Plaintiff in the above named case, hereby appeals to the Ninth Circuit Court of Appeals, from an ORDER dismissing Plaintiff's case on 11-15-00, entered on 11-16-00, and from an ORDER denying a timely MOTION under Rule 59(e). The Rule 59(e) motion was filed within 10 working days after the entry of the ORDER on 11-29-00. A rule 59(e) motion filed prior to the entry of judgment is considered timely.

This appeal is filed pursuant to Fed. R. App.P 4(A) 4 wherein the time for appeal runs from the date of the entry of the ORDER on the Rule 59(e) motion. The ORDER entered on 01-25-01 finally disposed of Plaintiff's action, although a JUDGMENT was not entered. As the United States Government is a party to the action the time for appeal is 60 days after the final order or judgment. The

ORDER appears to be a final disposition, but there is no separate judgment document.

Respectfully submitted,

Dated: March 5, 2001 /s/ Melbourne B. Weddle
MELBOURNE B. WEDDLE
Attorney for Appellant
Greg Allan Morgan
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Attorney for Plaintiff Greg Alan Morgan

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREG ALLEN MORGAN,

Plaintiff,

Vs.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department Of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his former capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON,

Case No.: 00-05221

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

1. Violation of 42 U.S.C. 1983 (Malicious Prosecution in Violation of the FOURTH Amendment)
2. Conspiracy to Violate 42 U.S.C. 1983 (Malicious Prosecution in Violation of the FOURTH Amendment)
3. Violation of 42 U.S.C. 1983 (Unlawful Search and Seizure in Violation of the FOURTH and FOURTEENTH Amendments)
4. Conspiracy to Violate 42 U.S.C. 1983 (Unlawful Search and Seizure in Violation of the

as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC GOODSON, as an individual and in his capacity as Airman, USAF; and DOES 1 through 10, inclusive,

Defendants

FOURTH and FOURTEENTH Amendments

5. Violation of 42 U.S.C. 1983 (False Arrest/ Imprisonment in Violation of the FOURTH and FOURTEENTH Amendments)

6. Conspiracy to Violate 42 U.S.C. 1983 (False Arrest/Imprisonment in Violation of the FOURTH and FOURTEENTH Amendments)

7. Violation of 42 U.S.C. 1983 (Malicious Abuse of Process in Violation of the FOURTEENTH Amendment)

* * *

ALLEGATIONS RELEVANT TO ALL CAUSES OF ACTION

(Filed May 15, 2000)

20. Plaintiff on information and belief and upon such belief alleges that Defendants, and each of them, not only performed prosecutorial acts relevant to this action, but performed purely investigatory acts which ordinarily are reserved and/or conducted by police officers, including but not limited to, having security personnel perform a warrantless search of Plaintiff's automobile without consent; arresting Plaintiff without probable cause; manufacturing probable cause to search based upon a small crack in the

bottom of Plaintiff's windshield; arresting Plaintiff based upon manufactured probable cause; denying Plaintiff the right to counsel and failing to provide the appropriate Miranda warnings to Plaintiff.

21. On or about May 16, 1999, Plaintiff drove his 1998 Jeep Cherokee onto Edwards Air Force Base in order to go to work.

22. Plaintiff presented his Federal Aviation Administration identification badge as is sometimes required upon entering Edwards Air Force Base.

23. Plaintiff was then signaled to stop and was approached by a security officer and ordered to pull off to the side of the road. Plaintiff complied.

24. Plaintiff parked his vehicle on the right hand side of the road as instructed.

25. Three security officers identified as Defendants BROUGHTON, ERICHSEN and GOODSON approached Plaintiff's vehicle.

26. Defendant GOODSON informed Plaintiff that he wanted to perform a vehicle search and began reading, from a clipboard, a prepared statement.

27. Defendant GOODSON then asked Plaintiff if he would consent to a search, Plaintiff denied consent.

28. Plaintiff informed Defendants that he did not want to be late for work.

29. After Plaintiff refused the voluntary search all three-security officers identified as Defendants BROUGHTON, ERICHSEN and GOODSON, walked to the rear of Plaintiff's vehicle, huddled and held a conversation.

30. Defendant BROUGHTON came back to Plaintiff's car and demanded Plaintiff's driver's license, proof of insurance and registration.

31. Defendant BROUGHTON grabbed Plaintiff's driver's license and registration and insurance documents and walked to the back of Plaintiff's vehicle.

32. Plaintiff, realizing he was going to be late for work, exited his vehicle and proceeded to walk to the guard shack to place a telephone call to his employer.

33. While Plaintiff was walking towards the guard shack, Defendant BROUGHTON said to Plaintiff "Get back into your car."

34. Plaintiff asked if he was under arrest. Defendant BROUGHTON told Plaintiff "No".

35. Defendant BROUGHTON suddenly yelled, "Cover me"

36. The two other security personnel, Defendants ERICHSEN and GOODSON and/or DOES 1-10, grabbed their gun handles while Defendant BROUGHTON placed handcuffs on Plaintiff.

37. Defendant BROUGHTON then searched Plaintiffs person and emptied Plaintiff's pockets.

38. Defendants BROUGHTON, ERICHSEN, GOODSON and/or DOES 1-10 then proceeded to search Plaintiff's vehicle in which was found an unloaded nine-millimeter semi-automatic gun.

39. At no time was Plaintiff apprised of his Constitutional rights nor was Plaintiff told of the alleged charges against him.

40. Subsequently, Plaintiff was turned over to the Kern County Sheriff's Department and transported to jail.

41. Plaintiff was charged with violations of California Penal Code sections 12025(A)(1), 12031, 148(A) and Vehicle Code section 14601.0(A).

42. Plaintiff was prosecuted in the Kern County Municipal Court for the aforementioned penal code violations.

43. The Honorable David L. Eckert determined that there was no probable cause to search.

44. On People's Motion all charges were dismissed against Plaintiff.

* * *

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Attorney for Plaintiff Greg Alan Morgan

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GREG ALAN MORGAN,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM COHEN, in his capacity as Secretary of the Department Of Defense; THE UNITED STATES AIR FORCE; GENERAL RICHARD REYNOLDS, as an individual and in his capacity as Commander, Flight Test Center, USAF; COLONEL EDWARD DEIULIO, as an individual and in his former capacity as Base Commander of Edwards Air Force Base, USAF; COLONEL NEIL RADER, as an individual and in his capacity as

Case No.: CV 00-5221 RSWL (BQRx)

PLAINTIFF'S FIRST AMENDED COMPLAINT AND COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

1. Bivens Action (Unreasonable Seizure in Violation of the FOURTH Amendment)
2. Violation of 42 U.S.C. 1983 (Unlawful Arrest, Search, and Seizure in Violation of the FOURTH Amendment)
3. Bivens Action (Unlawful Arrest, Search, and Seizure in Violation of the FOURTH Amendment)
4. Violation of 42 U.S.C. 1983 (Malicious Prosecution in Violation of the FOURTH Amendment)

Commander of Edwards Air Force Base Security Forces, USAF; C. ERIC BROUGHTON, as an individual and in his capacity as Sergeant, USAF; KENNETH ERICHSEN, as an individual and in his capacity as Sergeant, USAF; ERIC	5. Bivens Action (Malicious Prosecution in Violation of the FOURTH Amendment) 6. Violation of 42 U.S.C. 1983 (Malicious Abuse of Process in Violation of the FOURTH and FOURTEENTH Amendments)

* * *

behavior and/or actions of Defendants UNITED STATES, DOD, COHEN, AIR FORCE, REYNOLDS, DEIULIO, RADER, BROUGHTON, ERICHSEN, GOODSON and/or DOES 1-10 were flagrant abuses of power granted to them under the laws of the United States and/or under the laws of the State of California.

19. At all times relevant to this action the Defendants UNITED STATES, DOD, COHEN, AIR FORCE, REYNOLDS, DEIULIO, RADER, BROUGHTON, ERICHSEN, GOODSON and/or DOES 1-10 were acting under color of either state of federal law.

20. The Plaintiff resided within this district at all times relevant in this action.

FACTS RELEVANT TO ALL CAUSES OF ACTION

The "Closed Base" Administrative Regime

21. The "Closed Base" administrative regime is a euphemistic term describing the act of stopping (seizing) a person at the entrance of a federal enclave to inspect his or her identification documents. Possession, display and acceptance of proper identification documents, acknowledge that

the person "belongs to the enclave" and establishes the person's right of entry, terminating the seizure. Those not possessing proper identification documents are denied entry, but thereafter may enter, subject to restrictions. Such restrictions may include, signing a consent waiver that allows unrestricted searches in exchange for passage to enter i.e. Air Force Form 75, "CONSENT TO SEARCH".

The "Base Entry Point Check" Administrative Regime

22. The "Base Entry Point Check" is a distinctly separate administrative regime. The "Base Entry Point Check" was developed for military purpose, applicable to DOD "personnel" only and bottomed in authority derived from Uniform Code of Military Justice (UCMJ). SFS Form 12, the local form used to conduct "Base Entry Point Checks" states the purpose is for discovering e..dence of criminal activity (contraband and stolen property) thereby preserving the "security of the command". The terms "personnel" and "security of the command" possess clear and specific meanings under the statutes and regulations, and can never apply to Plaintiff by virtue of his status, among other things. "Base Entry Point Checks" are not conducted on all entrants, nor are they conducted on a continuous basis. Weeks may pass between "Base Entry Point Checks." Military "personnel" must submit to "Base Entry Point Checks" and do so through a special needs exemption of their constitutional rights granted by the Military Court of Appeals. All other persons do so by theory of "consent" evidenced by waiver. In some circumstances, failure to consent may cause administrative sanctions upon those who choose not to give "consent" i.e. termination of employment if DOD has control over the employee. In all

circumstances when consent is denied, many regulations require "All vehicles, ask the driver for permission to examine the vehicle and its contents. If permission is refused . . . advise all occupants that they cannot enter the base unless the vehicle is examined" AFH 31-218.

Freedom Of Information Act (FOIA) Material

23. On or about November of 2002, Plaintiff received a five pound box of evidence, obtained through a FOIA request, containing a partial copy of an administrative file, assembled by Defendant Air Force. Much of the contents were "expunged" but contained blank placeholders for the expunged material. Some sections contained information relevant to claims made herein, however specific parts of that information were "redacted". Other parts of the administrative file contained affidavits, as well as some military orders stamped "FOR OFFICIAL USE ONLY", not ordinarily obtainable through public means and were not previously known to Plaintiff. In addition, a significant portion of the file was dedicated to Lexis-Nexis printouts of caselaw centering upon the status of state officials acting in a federal capacity.

24. The police report filed by Defendants' contained a statement "BROUGHTON recorded much of this on his pocket recorder" indicating that the events of May 16, 1999 had been recorded. The administrative file contained a partial transcription of the tape recording referenced in Defendants' police report as well as other "Brady material" that had not been previously or properly disclosed under discovery rules in the underlying criminal matter. Thus certain facts asserted herein are materially supported by [Defendant's] transcription of the tape and affidavits

signed by them and Plaintiff was not aware of these materials until receipt of the FOIA material.

FOIA Material – Transcription of Tape Recording (TTR).

The transcription of the tape recording contains a total of 47 pages. Of those 47 pages, only the first 15½ contain conversational material, the remaining 31½ pages were expunged. Of the 15½ pages, some of the conversational material was intentionally omitted (redacted) as indicated by a "–", but by inference and totality of the conversation it is not difficult to understand that the redacted words or phrases were clearly damaging to Defendants. Only one or two of the statements attributable to Plaintiff suffer the same redactions. Due to the length of the transcription and other indicators, the recorder appears to have run most of the time Plaintiff was in custody, not only recording conversations with Plaintiff, but also conversations Defendant's held outside of Plaintiff's presence. The most relevant portions of the transcription are as follows:

1) **Plaintiff was arrested and not merely detained.**

"He got out of his car and was – (redacted, appears to be saying "arrested and") . . . the search was pursuant to the ***resisting arrest***"/TTR.

2) **Defendant BROUGHTON was the arresting official.**

Voice: "I know about Kern. Jack is just to double check on that authorization for searching of the car."

Defendant BROUGHTON: "We don't need it. The search – he got out of his car and was – ***I hooked him up for a 148*** – the search was pursuant to the resisting arrest"/TTR

3) Defendant BROUGHTON's apparent use of his state authority.

Defendant BROUGHTON: "Well I'd be happy to explain the law to you because I am well versed in the laws of search and seizure."/TTR

Plaintiff: "Uh hum. The laws or Air Force Regulations?"/TTR

Defendant BROUGHTON: "No. . . . State of California laws as they apply to you."/TTR

And later, Defendant BROUGHTON discussing the necessity to obtain probable cause several hours after Plaintiff was arrested.

Defendant BROUGHTON: "We don't need it. The search – he got out of his car and was – I hooked him up for a 148 – the search was pursuant to the resisting arrest."/TTR. Other inferences are present based upon the totality of the file, containing legal material which indicates great concern about this statement and the following statement made well after Plaintiff's arrest.

Defendant Broughton: "You're going to be booked for PC 148(a), which is obstructing ***myself*** in the performance of ***my*** duties."/TTR

4) Several hours after Plaintiff was arrested Defendants try to establish a foundation to justify the initial "resisting arrest". Discussion focuses upon Plaintiffs drivers' license.

Voice: "AS for as the suspension, it's hard to interpret because it's another state . . . " Voice: It says, "Suspended, court action required," that means that court action ***may be*** required before it gets reinstated. So we're going to go ahead and charge him with a suspension –?"/TTR

The Kern County Assistant District Attorney later determined this allegation was baseless and declined to prosecute.

Unsure of the status of Plaintiff's drivers' license, attention turns to whether Plaintiff is under the influence.

Defendant BROUGHTON: "What I am going to do right now is to give you a quick exam. I'll let you get up and let you sit in this chair, if you want."/TTR

Plaintiff: "Yeah."/TTR

Defendant BROUGHTON: "What I am going to do right now is I'm going to give you a quick examination to determine if you are under the influence of either drugs or alcohol, okay? So go ahead and sit here" [Background noise] "Do me a favor."/TTR

Voice: "Sure."/TTR

Defendant BROUGHTON: "In the – in my black bag in the back seat –."/TTR (Defendant BROUGHTON may be referring to bag in his automobile and property believed to be of Fresno County).

Voice: "Uh huh.'/TTR

Defendant BROUGHTON: "There's a green canvas bag inside."/TTR

Voice: [Inaudible] . . .

Defendant BROUGHTON: There's a green canvas bag inside my black bag with a stethoscope, we'll need that . . . "/TTR

Plaintiff: "I'm not going to submit to any test because I'm not drunk and you had no right to do this, understand?"/TTR

Defendant BROUGHTON: "I have a right to give you an examination."/TTR

Plaintiff: "For what?"/TTR

Defendant BROUGHTON: [Redacted by transcriber]

Plaintiff: "What probable cause?"/TTR

Defendant BROUGHTON: " – of any illegal substances of alcohol – "

5) The search followed the arrest and not under the auspice of any administrative regime.

Defendant BROUGHTON: "the search was pursuant to the resisting arrest."/TTR.

6) Plaintiff was subjected to a custodial interrogation without benefit of his attorney and after numerous demands for one.

Plaintiff: "I'm not going to submit to any test because I'm not drunk and you had no right to do this, understand?"/TTR

Defendant BROUGHTON: "I have the right to give you an examination."/TR

Plaintiff: For what?"/TTR

Defendant BROUGHTON: "–." The redaction by inference Defendant BROUGHTON is using the words "probable cause."

Plaintiff: "What probable cause?"/TTR

Defendant BROUGHTON: "To see if you are under the influence – ."/TTR The conversation continues, Defendant BROUGHTON questions Plaintiff, and Plaintiff refuses to answer.

Plaintiff: "You get me an attorney."/TTR

Defendant BROUGHTON refuses and Plaintiff repeats this demand several times throughout the custodial interrogation.

7) During the interrogation period, Plaintiff demands that Defendant BROUGHTON "Mirandize" him, Defendant Broughton refuses.

Plaintiff "I want you to advise me of my rights."/TTR

Defendant BROUGHTON: "I don't have to advise you of your rights . . "/TTR

8) Acknowledge that Plaintiff's handcuff's were excessively tight.

Voice (of a unknown officer talking to another unknown officer): " – handcuffs – one of the cuffs was so tight."/TTR

9) Plaintiff refused to cooperate with the interrogation; Defendant BROUGHTON is obviously frustrated and reports his frustration to presumably a superior. *THE SUPERIOR ORDERS THE BEATING OF Plaintiff.*

Voice (most likely Defendant BROUGHTON): "I think if he's under the influence of anything it's probably going to be weed. He's refusing to give us his home address, "I can't remember." What's your social security number, "I can't remember."/TTR

Voice (presumably a superior): "Beat it out of him."/TTR

Thereafter, the tape recording obviously terminates for a period of time.

FOIA Material – SFS Form 12

25. The SF Form 12 provided to Plaintiff under discovery during the criminal proceeding had been altered. The copy received under FOIA contained information not previously known to Plaintiff. The discovery copy had a black rectangular block running the forms lengths positioned in the upper two-thirds of the form. It appeared that the block was just bar separating different parts of the form. Such was not the case.

26. The copy received under the FOIA was remarkably different because it did not contain the black bar, but contained instructions to the Defendant police officers. Comparing the forms side by side, it become apparent that the black bar was not a black bar at all, but a section of the form expunged of critical information by a black

marker. A marker was used to expunge the following words: "**REFUSALS** [relating to refusal to consent to the voluntary search] **will be advised to depart the installation** . . . " Thus the expunged information states Defendants had a duty to ask Plaintiff to leave the installation in the event that consent was denied.

27. The top third of the form contains the following information in original emphasis:

"Good morning/afternoon/evening sir/ma'am, I'm _____ of the 95th Security Forces Squadron. I'm conducting Base Entry Point Checks as authorized by the Installation Commander . . . The purpose of this inspection is to discover contraband and prevent removal of government property. . . . **Will you consent to the inspection?** I'd like for you to turn off your ignition, open all compartments (glove box, trunk, etc.) and have all passengers exit the vehicle, THANK YOU."

FMIA Material – Defendant's Police Report

28. The Police Report provided to Plaintiff under discovery during the criminal proceeding had been altered. The copy received under FOIA contained information not previously known to Plaintiff. The discovery copy had parts of Defendant ERICHSEN's rendition of event blacked out. The copy received under the FOIA was remarkably different. The FOIA copy had different sections of blacked out, indicating that the original does not contain any blacked out sections. On the discover copy, the words and phrases expunged were the following:

> " . . . BROUGHTON took [Plaintiff] into custody for violation of PC148 (a), obstructing/delaying law enforcement . . . BROUGHTON searched

> [Plaintiff's] vehicle, incident to his apprehension."

However, on the FOIA copy the above words are not blacked out and clearly material as the arrest for "resting arrest" preceded the search and the search did not occur under authority of any administrative regime.

Material Events

29. Plaintiff herein is an Air Traffic Controller and employee/officer of the Federal Aviation Administration (FAA), Department of Transportation (DOT), (FAA is one of several federal agencies that have independent operations on the enclave, others include NASA, Postal Service ect., and of the total employed (10173), over seventy- five percent are non-military or a 3/1 ratio).

30. On or about May 16, 1999, at approximately 09:41 a.m., Plaintiff drove his 1998 Jeep Cherokee and arrived at the west gate entrance of "Edwards Air Force Base", after traveling eastward for approximately nine miles on Rosamond Blvd, a divided highway of concurrent state and federal jurisdictions and after passing a large stationary monument which states in very large letters, "Welcome to Edward Air Force Base".

31. This stationary monument is located just outside of the city of Rosamond, on land managed by the Department of the Interior and the State of California. After traveling on the divided highway for approximately nine miles, one passes a very small and illegible sign approximately five hundred yards before the entrances of the enclave, in an area wherein the speed is reducing from 45 mph to 25 mph, which stands far to the right of the divided highway,

warning DoD "personnel" that they may be subject to search. Plaintiff thereafter, approached a stop sign, on the two lane highway, with a wide open gate, much like the entrance of a national park, not barbed wired, with military personnel sitting in a building with large panes of glass called the "visitor control center", drinking coffee or playing cards.

32. Plaintiff presented his identification badge issued under authority of the Department of Transportation, Federal Aviation Administration, showing clearly that Plaintiff was employed at a location within the interior of the Federal Enclave to the security police officer who walked outside of the visitor control center to Plaintiff's car. The Federal Aviation Administration under Congressional mandate maintains and staffs a facility within the interior of the enclave and guarantees Plaintiff's right of access to its facilities and the protections of all rights under the Constitution of the United States. The military by agreement and statute is bound to allow FAA persons unrestricted access to FAA facilities. (Air Force Regulations state that the Base Commander is responsible to "set up entry controls to deter unauthorized people from entering the installation" and to "make sure that these controls allow authorized personnel to enter and leave the base efficiently" in support of the "Closed Base" administrative regime.).

33. The security police officer later identified as Defendant GOODSON, examined Plaintiff's government identification, as pursuant to the "Closed Base" administrative regime. Plaintiff's employer maintains a facility upon Edwards AFB and Defendant GOODSON accepted Plaintiff's identification as valid, Plaintiff belongs to the enclave.

Plaintiff did not enter the base or an area wherein security was imposed.

34. Defendant GOODSON then ordered Plaintiff to pull over to the side of the road; Plaintiff asked "Why". Without answering, Defendant GOODSON again ordered Plaintiff to pull over to the side of the road. Plaintiff complied and parked his vehicle on the south side of the divided highway, abeam to the visitor control center that was now to the north and left of Plaintiff's vehicle.

35. GOODSON, leading two other military security police personnel later identified as Defendant's BROUGHTON and ERICHSEN, walked south crossing the divided highway, from the visitor control center and approached the drivers' window of Plaintiff's vehicle.

36. Plaintiff rolled his window down and asked "May I help you?" Defendant GOODSON, holding a clipboard began to read from the attached SFS Form 12, "Good morning sir, I'm Airman GOODSON of the 95th Security Forces Squadron. I'm conducting "Base Entry Point Checks" as authorized by the Installation Commander . . . The purpose of this inspection is to discover contraband and prevent removal of government property. . . . Will you consent to the inspection?" (Air Force Regulations delegate to the Base Commander to determine "*when, where,* and *how*" to implement "Base Entry Point Check" policy).

37. Defendant GOODSON asked Plaintiff's consent to authorize a search of his vehicle and evidence such consent by signing a waiver contained on the clip board.

38. Plaintiff denied consent in clear and unambiguous terms, "No", and did not sign the waiver or otherwise consent to be searched either explicitly or implicitly what-so-ever

and he informed the law enforcement officers that he could not be late for work after being told that the search would take thirty to forty-five minutes.

39. Standard procedures for these unreasonable inspections require the occupants to open all locked compartments, exit the vehicle while drug dogs are introduced into the interior of the car and runaround inside, and every corner of the car inspected. It is common place for the police to remove door panels as well as open any item in the car, locked or not, all in the name of looking for drugs and usually takes in excess of 30-45 minutes.

40. Another component of the "Base Entry Point Check" is the requirement for it to be "random", it is most definitely not. The Base Commander selects the time period when the inspection regime is implemented, but that authority is delegated all the way down the chain of command to the execution level. Weeks may pass between inspections, but once authorized, the officers have discretion on who is searched (regulations required selection of every 5th or 8th vehicle, but this is rarely enforced or supervised thus giving power to the individual officer to select the randomness as was done in the present matter). When authorized, certain times of the day are forbidden due to volume of traffic to name a few.

41. Defendants BROUGHTON, ERICHSON AND GOODSON persisted with attempts to persuade Plaintiff to give permission and allow the voluntary search for approximately ten additional minutes. The tactics utilized by Defendants BROUGHTON, ERICHSON AND GOODSON, included, but were not limited to, intimidations threats, trickery, lies, deceits, harsh tones and profanity, all in violation of numerous orders and regulations that require

Defendant's BROUGHTON, ERICHSON AND GOODSON to cease attempts to gain permission to conduct a Base Entry Point administrative search once consent is denied. At one point in their efforts Defendant BROUGHTON approached Plaintiffs vehicle and shouted "ARE YOU GOING TO LET US SEARCH THIS F*CKING CAR OR WHAT!"

42. Plaintiff denied consent to the "Base Entry Point Check" on at least seventeen occasions. These denials came after Plaintiff had cooperated with and met the requirements of the "Closed Base" administrative regime. Defendant GOODSON accepted Plaintiff's identification as valid. Plaintiff's government identification plainly states that he is authorized to enter the enclave under authority of the Department of Transportation, Federal Aviation Administration and "belongs to the enclave"

43. The instruction and statement that Defendants were reading were contained on their SFS Form 12 "[t]he purpose of this inspection is to discover contraband and prevent removal of government property . . . " and [w]ill you consent to the inspection?, and "**REFUSALS** . . . : will be advised to depart the installation . . . ").

44. The police report filed by Defendants and received by Plaintiff weeks after the event, acknowledges that Plaintiff refused giving permission on at least three occasions e.g. "A1C GOODSON requested MORGAN's consent to inspect his vehicle, which MORGAN denied."

45. After the officers failed to gain Plaintiff's permission to grant the voluntary inspection, Defendants BROUGHTON, superior in rank, ordered Defendants ERICHSEN and GOODSON to follow him without saying anything further to Plaintiff.

46. Defendants BROUGHTON, ERICHSEN and GOODSON retreated next to a police cruiser located approximately fifteen feet behind Plaintiff's vehicle.

47. Plaintiff observing in his rear view mirror, all three officers standing in a circle next to the left front tire, talking among themselves. Plaintiff waiting anxiously and predicting further harassment prepared his driver's license, vehicle registration and insurance card.

48. After approximately five minutes, Defendant BROUGHTON walked from the police cruiser to the rear window driver's side of Plaintiff's vehicle. The window was halfway down and Defendant BROUGHTON leaned to it, and in an angry voice demanded Plaintiff's driver's license, insurance papers and registration.

49. Plaintiff complied having the documents at the ready, placed his arm halfway out the window. Defendant BROUGHTON, standing from behind and with considerable force, grabbed the documents including Plaintiff's hand wrenched it backward, nearly breaking Plaintiff's wrist. Defendant BROUGHTON returned to the area behind Plaintiff's vehicle to the left front area of the police cruiser.

50. The officers returned to their circle and continued talking among themselves. After a period of time, Plaintiff examined his watch and observed a time of approximately 09:58 am. Realizing that he was going to be late for work, Plaintiff locked his vehicle, exited and began to walk to the visitor control center to use the public phone to call his employer and inform them of the events.

51. Plaintiff, while dodging cars walked north across the divided highway to the visitor control center which was approximately fifty feet away.

52. When Plaintiff was halfway across the divided highway, he heard a muffled shout (the wind was blowing from the west into Plaintiff's ear). Plaintiff turned around to his left and behind, and faced the direction of the shout. Plaintiff did not immediately understand the words of the shout because of the auto noise and wind.

53. Plaintiff was now facing the three officers who were still at the front of the police cruiser, approximately 25-30 feet away. Plaintiff said "What?" BROUGHTON shouted "get back in your car". Plaintiff then replied to Defendant BROUGHTON, "I'm late for work, and need to use the telephone to call my boss and tell him that you want to search my car." Plaintiff then asked Defendant BROUGHTON "Am I under arrest?"

54. Defendant BROUGHTON shouted "NO" Plaintiff replied "Ok then, I'm just going over here to use the phone, ok?" Plaintiff pointed to the direction of the visitor control center that was now to his right and approximately 15-20 feet away, and not in the direction of the officers.

55. Defendant BROUGHTON then shouted, "You're obstructing a police officer!" Plaintiff replied, "No I'm not, I am not obstructing anything!"

56. At that instant one of the Defendants shouted "FREEZE" and Defendant BROUGHTON screamed "COVER ME" and all three Defendants grabbed their weapons (believed to be 9mm handguns) and assumed a threatening stance directed at Plaintiff. Plaintiff did not move for fear of his life.

57. Defendant BROUGHTON then charged Plaintiff, thrusting his body into him, knocking Plaintiff off balance, causing Plaintiff to nearly fall to the ground save for Defendant BROUGHTON grabbing Plaintiffs arm and pulled uprighting him.

58. Defendant BROUGHTON breathing very hard, handcuffed Plaintiff in a manner that was excessively and unreasonably tight such that Plaintiff immediately lost circulation in his hands causing him searing pain. Then Defendant BROUGHTON standing from behind Plaintiff and holding Plaintiffs arm with his left hand, removed Plaintiffs wallet and threw it over his left shoulder toward the police cruiser and doing the same with Plaintiff's keys.

59. Defendant's police report and the Transcript of the Tape Recording stated at the time of the arrest, Plaintiff was arrested for allegedly violating California Penal Code Section 148(a) "resisting arrest when Plaintiff had violated no law, had committed no offense, had provided no provocation, had not threatened, did not appear to threaten, was incapable of committing any act upon these (four) heavily armed Defendants what-so-ever nor did Defendants have any justification, or authority or reasonable suspicion or evidence or probable cause that Plaintiff had committed any offense or other offense.

60. Defendant BROUGHTON then marched Plaintiff north to the visitor control center (wherein Plaintiff was originally going in the first place) away from the police cruiser and away Defendant's ERICHSEN and GOODSON.

61. Inside the visitor control center Defendant BROUGHTON ordered Plaintiff to sit in a small steel chair with steel armrests. Plaintiff, with his arms handcuffed behind his

back, did not fit in the chair, further complicating his circulation loss.

62. When Defendant GOODSON entered the visitor control center Defendant BROUGHTON ordered Defendant GOODSON to, "Watch him, don't let him get away" while grabbing his gun, signaling to GOODSON to shoot Plaintiff. Plaintiff was in fear for his life.

63. The visitor control center contains large glass windows, and all cars passing by at slow rates of speed could easily view Plaintiff in handcuffs while Defendant GOODSON stood guard upon Plaintiff.

64. Plaintiff demanded that Defendant BROUGHTON let him go and asserted his rights. Defendant BROUGHTON replied that he " . . . Knew the law . . . " and that he was a " . . . police *instructor* . . . "

65. Defendant BROUGHTON exited the visitor control center to the vicinity of the police cruiser. GOODSON assumed a threatening stance and stood watch over Plaintiff holding onto his gun.

66. From Plaintiffs vantage point, looking out the door of the visitor control center, he could see Defendant ERICHSEN searching his vehicle. Plaintiff could also see Defendant BROUGHTON standing over the trunk of the police cruiser, removing items from Plaintiff's wallet nonchalantly tossing the items around. Plaintiff demanded that Defendants BROUGHTON and ERICHSEN stop searching his property asserting that he did not authorized anyone to conduct a search.

67. Defendant GOODSON was standing against the south wall of the visitor control center guarding Plaintiff wearing a radio. A voice believed to be Defendant ERICHSEN,

shouted over the radio "We gotta a gun! We gotta gun!" a second voice replied "What?"

68. The voice believed to be Defendant ERICHSEN, shouted again said "We gotta gun! The second voice replied "All right, all right!"

69. Additional security personnel had arrived, and assembled in the proximity of Plaintiff's vehicle. All were shouting with cheers of joy and congratulating each other. Two unknown security police officers gave Defendant ERICHSEN a high-five. Defendant ERICHSEN was waiving the gun gleefully over his head.

70. Plaintiff saw Defendant ERICHSEN walk toward Defendant BROUGHTON with the gun taken from Plaintiff's vehicle. The gun was not loaded and was properly secured. Plaintiff asked Defendant GOODSON to turn around and look at the gun so that he may see that it was not loaded. Defendant GOODSON declined and said: "I don't want to know any more about this situation".

71. As one of the recreational activities, Edwards encourages the joining of the local "Rod and Gun Club" and maintains several shooting ranges as well as sells guns on the enclave.

72. Defendant BROUGHTON upon returned to the visitor control center said to Defendant GOODSON, "Congratulations Airman GOODSON, *we were right*, good job!" Defendant GOODSON grudgingly and with a look of embarrassment replied "Thanks".

73. After a period of time, Plaintiff informed Defendant GOODSON that his handcuffs were extremely tight and they had cut off the circulation from his hands. Defendant GOODSON obtained permission to examine the handcuffs,

and did so, but stated he was denied permission to loosen them because it was their policy that only the arresting officer could give such permission.

74. Defendant BROUGHTON then escorted Plaintiff to a waiting police curser. Plaintiff attempted to sit in the front seat as instructed and while still handcuffed attempted to do so, however because the seat was moved to the most forward position, Plaintiff was unable to sit squarely in the seat. Defendant BROUGHTON bent over and with his forearm gave Plaintiff a sharp and unnecessary blow to Plaintiff throat and forced Plaintiff back into the seat.

75. Plaintiff was then transported to the security station placed in custody and locked into a small room. Approximately an hour and a half later an officer entered the room. Plaintiff again complained that his handcuffs were extremely tight and that he had lost all feeling in his hands. The officer examined the handcuffs and left the room. Returning sometime thereafter, un-handcuffed Plaintiff. After the officer un-cuffed Plaintiff, Plaintiff nearly passed out because of the loss of circulation. Plaintiff's hands had turned sickeningly dark blue with deep red gouges in his wrists with bruises. Plaintiff was allowed to stretch for about five minutes then re-handcuffed.

76. At this time, the Transcript of the Tape Recording reveals a discussion among several of the police officers who are performing some sort of investigation relating to the condition of Plaintiff's drivers license. The time is estimated to be between one and a half hours to two hours after Plaintiff was arrest and is in custody. These conversation take place some other location and away from Plaintiff. The results of the investigation appear to cause some alarm, as nothing is found to be conclusively amiss.

> Voice: "AS for as the suspension, it's hard to interpret because it's another state . . . "
>
> Voice: "It says, "Suspended, court action required," that means that court action *may be* required before it gets reinstated. So we're going to go ahead and charge him with a suspension –?"/TTR
>
> The Kern County Assistant District Attorney later determined this allegation was baseless and declined to prosecute.

77. Approximately two hours later, Defendant BROUGHTON entered the room and began a custodial interrogation of Plaintiff. The purpose of this custodial interrogation was to obtain "probable cause" of Plaintiff's now suspected use of alcohol or drugs.

> Defendant BROUGHTON: "I have the right to give you an examination."/TTR
>
> Plaintiff: For what?"/TTR
>
> Defendant BROUGHTON: "–." The redaction by inference Defendant BROUGHTON is using the words "probable cause."
>
> Plaintiff: "What probable cause?"/TTR
>
> Defendant BROUGHTON: "To see if you are under the influence – ."/TTR

78. During the interrogation, Plaintiff repeatedly asked for an attorney. Defendant BROUGHTON denied all his requests. Plaintiff also demanded that he be given his Miranda rights but was told by Defendant BROUGHTON that he didn't have to.

79. Plaintiff refused to cooperate with the custodial interrogation and continued to demand an attorney.

Defendant BROUGHTON told Plaintiff that if he did not cooperate, he would not be released from jail. Plaintiff fearing that he was being "framed" still refused to cooperate.

80. Defendant BROUGHTON visibly frustrated, left the room. The Transcript of the Tape reveals that Defendant BROUGHTON expressed his frustration that Plaintiff would not cooperate to a DOE Defendant, currently unknown to Plaintiff (most likely a supervisor) who then orders Defendant BROUGHTON to "Beat if out of him".

81. The Transcript of the Tape indicates that the recorder was turned off.

82. Defendant BROUGHTON again returned to the small room and shut the door wherein Plaintiff was handcuffed and unable to defend himself. Defendant BROUGHTON physically abused Plaintiff by grabbing Plaintiffs cheeks and demanded that Plaintiff cooperate, Plaintiff still refused. Defendant BROUGHTON again left the room.

83. The Transcript of the Tape indicates that the recorder was turned on again.

84. Defendant BROUGHTON returned to the small room and announced the following to Plaintiff as taken from the Transcript of the Tape:

> "You're going to the Kern County Jail for violation of 12025 and 12031, which is a concealed loaded handgun. Your handgun is considered loaded when the magazine is in the immediate proximity. You're also going to be booked for PC 148(a), which is obstructing myself in the performance of my duties. And I haven't decided yet

> if we were going to try to get a further examination of you and possibly book you for driving under the influence of a controlled substance."/TTR

85. Plaintiff replied "That's not true". Not even a scintilla of suspicion let alone probable cause existed for any of the above alleged offences prior to Plaintiff's arrest for "resisting arrest" and subsequent search of his vehicle "pursuant to the resisting arrest", followed by the custodial interrogation.

86. (At approximately 10:30 in the morning, Plaintiff's wife had received a telephone call from Plaintiff's employer informing her that Plaintiff had not show up for work. Highly alarmed, she and her two young children went looking for her missing husband and made her way to Edwards. Eventually, she met up with Defendant BROUGHTON who told her that Plaintiff had been arrested because Plaintiff "refused to let the security police search his car." Concerned about Plaintiff, Plaintiffs wife asked Defendant BROUGHTON if she could see her husband. Defendant BROUGHTON said that it wasn't their policy but he would allow her to do so, so long as she "consented" to a search of her car. She eventually capitulated after threats of her arrest and further harm to Plaintiff)

87. Defendant BROUGHTON began to physically examine Plaintiff including using medical equipment, looking for evidence that Plaintiff was under the influence of illegal drugs.

88. Plaintiff fearing that he was being framed again demanded an attorney. Defendant BROUGHTON asserted that he was a "drug recognition expert" and was under the "belief" that Plaintiff had used illegal drugs. Plaintiff, an

Air Traffic Controller for over 20 years with an exceptional record, is subject to random urinalysis by FAA and has never contemplated the use of or tested positive for illegal drugs.

89. Still fearing that he would be framed, Plaintiff asserted that Kern County should make the examination, or otherwise a blood analysis should be taken. Defendant BROUGHTON refused these request, and proceeded with his own analysis and stated in his "drug recognition expert" opinion, that Plaintiff "was all f*cked-up on weed."/TTR Eventually Defendant BROUGHTON wore Plaintiff down and he grudgingly and only to a very small degree, cooperated with Defendant BROUGHTON's custodial interrogation.

90. While Plaintiff was in the custody of the officers, a Doe Defendant, currently unknown to Plaintiff, telephoned his employer identified himself as a Air Force security police officer and informed a member of Plaintiff's peer group, one Eric Corscadden, Plaintiff had "gone crazy", had "been arrested", and had "attacked the security police with a gun".

91. Defendants had at sometime contacted the Kern County Sheriff's Department to further the prosecution of Plaintiff (documents received from the Kern County Sheriff Department state that the initial call was received by them at 14:00 or 2 o'clock in the afternoon). Eventually, an Officer of the Kern County Sheriff's Department, Ian Chandler, arrived to take custody of Plaintiff for transportation to the Mohave Jail Facility. Officer Chandler removed Defendant BROUGHTON handcuffs, and replaced them with his own. Officer Chandler commented on the appearance of Plaintiff wrists and hands. Officer Chandler

did not tighten his handcuffs nearly as tight as the previous ones were.

92. While Plaintiff was locked in the back of the police car and being transported to the Mohave Jail Facility, Plaintiff asked Officer Chandler if he was being arrested. Officer Chandler responded "As far as I am concerned you were arrested at 10:10 this morning."

93. Plaintiff asked Officer Chandler "is someone going to read me my rights?" Officer Chandler in a shocked tone said: "They didn't do that?" Plaintiff replied: "No" Officer Chandler said: "Well they should have because they arrested you!"

94. Upon arrival at the Mohave Jail Facility, Plaintiff was fingerprinted and photographed (again), processed, and at approximately 5:00 p.m. Plaintiff was released from the jail facility.

95. The following Monday, May 17th 1999, the rumor machine went into high gear. Plaintiff was subjected to inaccurate, inflammatory, colorful, exaggerated and sometimes outrageous renditions of the previous day's event resulting into a smear campaign against Plaintiff, advanced by official and unofficial military sources. The smear campaign included statements among other things, that Plaintiff was a threat to "national security". The allegations were so alarming, Plaintiff's employer was compelled to withdrawal his security clearance. Plaintiff employer, the Federal Aviation Administration, removed Plaintiff's Government Identification Documents, thus preventing Plaintiff from being able to enter the enclave; Plaintiff no longer "belonged".

96. Thereafter Plaintiff was suspended for over 90 days. The FAA, Plaintiff's employer, conducted its own investigation into the allegations. Plaintiff's employer concluded that the allegations asserted against Plaintiff were baseless.

97. The smear campaign was so alarming to Plaintiff's peers; at one point, a petition was circulated, asking that Plaintiff be removed from employment. On another occasion, Plaintiff attempted to seek employment elsewhere. During an interview for a position in Portland Oregon, Plaintiff was told that he would not be promoted because "he tried to wipe out the military with a gun". The spreading of the rumors was accomplished by military sources sending letters to, conducting meetings with, and sending investigators to interview Plaintiff's peers and supervisors.

98. The rendition of events of May 16, 1999 provided in the police report filed by Officer Chandler, states in part:

> "BROUGHTON HAD DETAINED, GREG MORGAN, AFTER PERFORMING A ROUTINE VEHICLE SEARCH OF MORGAN'S VEHICLE. DURING THAT SEARCH BROUGHTON RECOVERED A LOADED FIREARM FROM MORGAN'S VEHICLE . . . FOR DETAILS (sic) OF THE SEARCH AND DETENTION OF MORGAN SEE ATTACHED COPY OF SECURITY POLICE REPORT#I1999050022. BASED ON BROUGHTON'S STATEMENTS . . . " The enumerated charges taken from Chandler's report and listed in exact order are:

Crime Code	Code/ Section	Description
5011	PC12031	POSS FIREARM IN VEH
5011	PC12031	POSS. LOADED FIREARM
5011	PC148(a)	RESISTING ARREST
6011	VC14601.1a	DRIVING UNDER SUSP. LIC

99. On or about June 22, 1999, an arraignment was had at Mohave Court Facility, Plaintiff with his retained counsel, entered a plea of "Not-guilty." Thereafter, Plaintiff was required to attend many court proceedings. Plaintiff was offered several plea agreements, but rejected all upon his firm conviction that he had done nothing wrong.

100. The police report filed by Defendants, obtained long after the incident, through discovery in the subsequent criminal action, states that Plaintiff was arrested for violation of C.P.C. § 148(a), interfering with a California Peace Officer, and was the basis for the search " . . . BROUGHTON took [Plaintiff] into custody for violation of PC 148 (a), obstructing/delaying law enforcement . . . BROUGHTON searched [Plaintiff's] vehicle, incident to his apprehension." The former signed by ERICHSEN under oath. Additional charges were stated as violation of C.P.C. § 12025(a)1, C.P.C. § 12031 and C.V.0 § 14601(a).

101. The report filed by the officers also states that BROUGHTON possessed a pocket recorder and had surreptitiously "recorded much" of the events.

102. Plaintiffs criminal counsel moved to suppress all evidence pursuant to California Penal Code Section 1538.5 upon assertion that Defendant did not have probable cause to arrest, or search Plaintiff.

103. People's Counsel for Kern County asserted in his moving papers in opposition to the 1538.5 motion asserted facts "Defendant [Plaintiff here] was then arrested for violation of Penal Code section 148 . . . .Broughton then initiated a search of defendant's vehicle incident to the arrest."

104. On or about September 1999, during the hearing to suppress, Defendant BROUGHTON appeared in the Kern County Municipal Court on behalf of the People of the State of California, wearing his Fresno County Sheriff's Department uniform, a badge of a peace officer of Fresno County, a gun issued by Fresno County and other indicia of state authority.

105. The rules of the Kern County Municipal Court issued and posted at each entrance of the court by John D. Oglesby state with specificity:

> "RE: Court House Security.
>
> IV No weapons of any kind may be brought into the courthouse except as follows:
>
> > By a duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the California Penal Code or by a full-time peace officer of another state or the federal government carrying out official duties in Kern County who is in job duty uniform (or ***who wears clearly visible indicia with photo card/ or shield of the police agency represented***) and is not appearing in court on his/her own behalf as a litigant or in other than an official capacity".

106. On or about September 23, 1999 the charge for "resisting arrest" was not based upon probable cause; that is the state of the facts in the mind of the prosecutor would not lead a man of ordinary caution and prudence to believe, or entertain an honest or strong suspicion that Plaintiff was guilty and declined to prosecute after Municipal Court Commissioner David L. Eckert ruled pursuant to Plaintiff's 1538.5 motion that the search of Plaintiff's vehicle, without his consent, lacked probable cause. The charge for "driving on a suspended license" was dismissed as defective. Thereafter the Commissioner granted the People's motion to dismiss all criminal actions terminating the case in Plaintiff's favor.

107. Thereafter, Plaintiff obtained an order of the court directing that the military security staff return Plaintiff's property and property removed from his vehicle to wit, Plaintiff mailed said order to Defendant Air Force. After two weeks, hearing no response, Plaintiff attempted to deliver a copy of the court order to agents and/or employees of Air Force. Plaintiff was met by an unknown agent and/or employee of Air Force who told Plaintiff "I DON'T GIVE A F*CK WHAT YOU GOT, WERE THE AIR FORCE AND WE DON'T HAVE TO LISTEN TO ANY COURT, GET OUT OF HERE OR I'LL ARREST YOU AGAIN!" Plaintiff departed and since has not had any of his property returned.

* * *

U.S. District Court
CENTRAL DISTRICT OF CALIFORNIA
(Western Division – Los Angeles)
CIVIL DOCKET FOR CASE #:
2:00-cv-05221-RSWL-RC

Greg Alan Morgan v. USA, et al
Assigned to: Judge Ronald Lew
Referred to: Magistrate Rosalyn M. Chapman
Demand: $0
Cause: 42:1983 Civil Rights Act

Date Filed: 05/15/2000
Jury Demand: Both
Nature of Suite: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Plaintiff	represented by	**Sue Ann Howard**
Greg Alan Morgan		Sue A Howard Law Offices 44421 10th St W, Ste H Lancaster, CA 93534 661-726-9000 *LEAD ATTORNEY ATTORNEY TO BE NOTICED*
V.		
Defendant	represented by	**John E Nordin II**
United States of America		AUSA-Office of US Attorney Civil Division 300 N Los Angeles, St, Ste 7516 Los Angeles, CA 90012 213-894-3552 Email: LA.Civil@usdoj.gov *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

* * *

10/16/2000	12	REPLY decl & exh by defendants re Mot to dism cmp [5-1] (ir) (Entered: 10/18/2000)

* * *

05/19/2003 44 MINUTES: MANDATE from Circuit court of Appeals affirming in part, reversing in part and remanding decision of USDC be filed and spread on minutes of this court; status conference set 6/9/03 9:00 and wil also address issue of notice of document discrepancy re attempted filing of the first amended complaint (lc) (Entered: 05/20/2003)

* * *

12/04/2003 121 NOTICE OF DISCREPANCY AND ORDER by Judge Ronald Lew ordering motion to strike first submitted by plaintiff received on 12/3/03 is not to be fld but instead rejected; Denial based on: no notice/untimely hearing; motion date closed (lc) (Entered: 12/08/2003)

* * *

12/09/2003 131 NOTICE OF MOTION AND MOTION by plaintiff Greg Alan Morgan to strike defendants rule 8(c) answers to amended complaint; (amended for change of hearing date) motion hearing set for 9:00 1/12/04 [STRIKEN FROM RECORD per 12/15/03] (lc) Modified on 12/16/2003 (Entered: 12/16/2003)

* * *

12/22/2003 138 EX PARTE APPLICATION filed by plaintiff Greg Alan Morgan for leave to file motion striking defendants asnwer to first amended complaint; Lodged order (lc) (Entered: 12/22/2003)

12/22/2003	PLACED IN FILE – NOT USED: [Proposed] Order granting defendants motion for summary adjudication of the vivens unreasonable search claim, the implied consent issue and the qualified immunity issue; Lodged 11/25/03 (jp) (Entered: 12/23/2003)
12/22/2003	PLACED IN FILE – NOT USED: Statement of Undisputed Facts and Conclusions of Law in suppor tof defendants motion for summary adjudication of the bivens unreasonable search claim, the implied consent issue and the qualified immunity issue; Lodged 11/25/03 (jp) (Entered: 12/23/2003)
12/22/2003	PLACED IN FILE – NOT USED: [Proposed[Order granting defendants motion for summary judgment in constitutional tort case as to any remaining claims; Lodged 11/25/03 (jp) (Entered: 12/23/2003)
12/22/2003	PLACED IN FILE – NOT USED: Statement of Undisputed Facts and Conclusions of Law in support of defendants motion for summary judgment in constitutional tort case as to any remaining claims; Lodged 11/25/03 (jp) (Entered: 12/23/2003)

* * * *

(2)

No. 06-87

Supreme Court, U.S.
FILED
OCT 2 0 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

GREG ALAN MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
BARBARA C. BIDDLE
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Attorneys
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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that its prior ruling affirming the dismissal of all but one claim, and remanding only that claim for further development of the factual record, precludes petitioner's attempt to relitigate the dismissed claims or to raise new claims that could have been raised in the original complaint.

2. Whether petitioner, by driving into the guarded entry gate area of a closed military base, after having been warned by signs and by his superiors that he and his vehicle would be subject to search when on or entering the base, impliedly consented to the search of his vehicle.

Constitution, statutes and rules: Page

U.S. Const.:
Amend. IV 4, 5, 6, 7, 8
Amend. V 6
Amend. VI 6
Amend. XIV 6
Federal Employee's Compensation Act, 5 U.S.C. 8116(c) 6, 8
Federal Tort Claims Act, 28 U.S.C. 1346(b) 4
18 U.S.C. 2511 ..... 4, 6, 8
42 U.S.C. 1983 ..... 3, 4, 6
42 U.S.C. 1985(1) 3, 4
42 U.S.C. 1985(3) 3
Cal. Pen. Code (West):
§ 148(a) (1999) 2
§ 632 (1999) 3
§ 12025(a) (2000) 2
§ 12031(a) (2000) 2
Cal. Veh. Code §14601.1(a) (West 2000) 2
Fed. R. Civ. P.:
Rule 15 ..... 9, 10
Rule 15(a) 9, 10
Rule 56(f) 6, 8
Rule 12(b)(6) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted in 166 Fed. Appx. 292. The opinion of the district court (Pet. App. 24-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2006. A petition for rehearing was denied on April 19, 2006 (Pet. App. 61). The petition for a writ of certiorari was filed on July 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a civilian air traffic controller employed by the Federal Aviation Administration (FAA) on Edwards Air Force Base in California. According to peti-

tioner's complaint, on the morning of May 16, 1999, petitioner arrived at the base entry gate displaying his FAA identification badge. A base guard, Airman Eric Goodson, directed petitioner to stop his jeep on the side of the road, which petitioner did. Goodson asked if he could search petitioner's car, but petitioner declined, telling Goodson that he did not want to be late for work. After Goodson conferred with two other officers, Master Sergeant Kenneth Erichsen and Master Sergeant C. Eric Broughton, Broughton asked to see petitioner's vehicle registration, driver's license, and insurance papers. After the officers returned to the rear of petitioner's jeep, petitioner exited his car and walked toward the guard shack. Broughton ordered petitioner to get back into his vehicle. Petitioner responded by asking if he was under arrest. Broughton responded that he was not, but then, when plaintiff disputed the officer's direction instead of immediately returning to his car, Broughton handcuffed petitioner. Pet. App. 7-8, 86.

The officers then searched petitioner and his vehicle. During their search of the jeep, the guards discovered an unloaded nine-millimeter semi-automatic pistol in the car. The officers detained petitioner and turned him over to state authorities. Pet. App. 8-9. Petitioner alleges that, during his detention, Broughton tape-recorded petitioner's conversation with the officers. *Id.* at 19.

The State of California brought charges against petitioner under Sections 148(a), 12025(a), and 12031(a) of the California Penal Code (West 1999, 2000), for resisting, delaying or obstructing an officer, carrying a concealed firearm, and carrying a loaded firearm. Petitioner was also charged under Section 14601.1(a) of the California Vehicle Code (West 2000) for driving with a suspended or revoked license. The Penal Code charges were

dismissed by a state court on the ground that the guards lacked probable cause to search petitioner's vehicle and petitioner's expressed refusal to consent negated any implied consent from his presence at the base gate. The Vehicle Code charge was later dismissed as well. Pet. App. 9; *id.* at 59-60.

2. Petitioner filed this action in the United States District Court for the Central District of California alleging 25 causes of action against Broughton, Erichsen, Goodson, the United States, the Department of Defense, the Air Force, the Secretary of Defense, and three Base supervisory officials (Major General Richard Reynolds, Colonel Edward De Iulio, and Lieutenant Colonel Neil Rader). Pet. App. 9. The complaint alleged constitutional tort claims pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 42 U.S.C. 1983, 1985(1) and (3), and claims for unlawful recording of conversations under 18 U.S.C. 2511 and Section 632 of the California Penal Code (West 1999). Pet. App. 7, 17-19.

The district court dismissed all of petitioner's claims with prejudice. Pet. App. 55-57. The court dismissed the Section 1983 claims for failure to allege that the respondents acted in concert with state officials; dismissed the Section 1985(1) claims for failure to allege facts to support a claim that he was deprived of his constitutional rights on account of discharging his official duties; dismissed the Section 1985(3) claims for failure to allege racial or other invidious class-based discrimination; and dismissed the unlawful recording claims for failure to state a claim of eavesdropping. *Id.* at 56-57. The court also dismissed the *Bivens* claims, holding that "[a]s Edwards Air Force Base is a closed base, the [respondents] were not required to have probable cause to stop, inspect

and/or search [petitioner] and his vehicle, or to detain, and arrest [him]," and there was accordingly no Fourth Amendment violation. *Id.* at 57.[1]

The district court's order specified that dismissal was "with prejudice." Pet. App. 57. The court explained that "[i]t does not appear that plaintiff could state a claim upon which relief could be granted if allowed to amend." *Ibid.*

3. The court of appeals affirmed "in every respect, except with regard to the court's dismissal of the *Bivens* claim," Pet. App. 17, and remanded "that claim alone * * * to the district court for further proceedings," *id.* at 15. The court took the unusual step of issuing two opinions in connection with petitioner's appeal, an unpublished ruling disposing of all the non-*Bivens* claims, *id.* at 16-20, and a separate published ruling addressing and remanding the *Bivens* claim, *id.* at 6-15.

In its unpublished opinion, the court of appeals agreed that petitioner failed to allege that respondents acted under color of state law as required to state a claim under Section 1983, Pet. App. 17-18, noted that petitioner had failed to preserve his claims under Section 1985(1) and (3) on appeal, *id.* at 17 n.1; and held that because the officers could lawfully record their own conversation with petitioner, which took place in public, there was no violation of the federal or state statutes concerning unlawful recording, *id.* at 19. The court also rejected petitioner's attempt to assert for the first time on appeal a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1). Pet. App. 19. The court held that because the FTCA claim was not presented in the complaint and was

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[1] The court used the term "closed" to indicate that the base is not open to the public, rather than "nonoperational." See Pet. App. 7 n.1.

not raised in the district court, "[i]t is waived and we do not consider it." *Ibid.*

The court of appeals addressed in a separate opinion (Pet. App. 6-15) petitioner's *Bivens* claims, "[a]ll of [which] * * * depend[ed] upon the search's failure to comply with the Fourth Amendment," *id.* at 11. The court held that the district court had erred in dismissing the Fourth Amendment claims under Federal Rule of Civil Procedure 12(b)(6) on account of "the closed nature of the active military Base" because petitioner's "Complaint contains no allegations as to the status of the installation." Pet. App. 7. The court rejected any suggestion by the district court that there is "a categorical exception to the probable cause rule for all searches on closed military bases," and held, instead, that the relevant question is whether an individual has "impliedly consented to the search" in light of circumstances at the base. *Id.* at 15. The court of appeals therefore reversed the district court's Rule 12(b)(6) dismissal of petitioner's *Bivens* claim, and remanded *"that claim alone* * * * to the district court for further proceedings on a more complete factual record." *Ibid.* (emphasis added).

4. On May 2, 2003, petitioner sought to file an amended complaint in the district court, which the district court rejected on the ground that the court of appeals' mandate had not issued nor had the district court reopened the case at the time of the attempted filing. See Pet. App. 47-48, 49-50; Docket Entry Nos. 44, 55, No. CV 00-5221 (C.D. Cal.). Petitioner's next attempt to file an amended complaint was also rejected because petitioner did not have leave of court. See Pet. App. 42-43; Docket Entry Nos. 47, 53, No. CV 00-5221 (C.D. Cal.).

Petitioner later moved for leave to file a First Amended Complaint, which the district court granted on

October 3, 2003. See Pet. App. 40-41. The amended complaint alleged essentially the same Fourth Amendment claims under *Bivens* as had petitioner's prior complaint. In addition, petitioner reasserted his claim under 42 U.S.C. 1983 and added new claims under the Fourth, Fifth, Sixth, and Fourteenth Amendments for excessive force and illegal custodial interrogation (Counts 8-11).[2]

After the close of discovery, the district court granted summary judgment in favor of respondents on petitioner's *Bivens* and other constitutional tort claims. Pet. App. 24-30.[3] The court held that "all claims in the first amended complaint, except the *Bivens* claim the Ninth Circuit remanded, are barred by the doctrines of res judicata and the law of mandate." *Id.* at 29. Moreover, with regard to the supervisor respondents, the court concluded that petitioner "failed to establish a causal connection between any supervisory act and the alleged constitutional violations," and those defendants could not be held liable under a "respondeat superior" theory. *Ibid.*[4]

The court held that the three officers involved in the incident were entitled to qualified immunity because

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[2] Petitioner also filed a second action seeking damages against the United States under the FTCA based upon the same incident, which was assigned to the same district court judge who presided over the earlier suit. No. CV 03-2372 (C.D. Cal.).

[3] The district court, having already extended the discovery cutoff once, denied petitioner's motion for a further extension, Docket Entry No. 135, No. CV 00-5221 (C.D. Cal.), and similarly denied petitioner's request pursuant to Federal Rule of Civil Procedure 56(f) to delay ruling on respondents' summary judgment motion. Pet. App. 32.

[4] The court also held that petitioner's claims against the United States, the Department of Defense, the Air Force, and the individual defendants sued in their official capacities were precluded by the exclusive remedy available under the Federal Employees' Compensation Act, 5 U.S.C. 8116(c). Pet. App. 28-29.

their actions "did not violate any clearly established statutory or constitutional rights." Pet. App. 29. The court further held, based on the undisputed facts, that petitioner's Fourth Amendment *Bivens* claims failed because "[t]he totality of the circumstances puncture any reasonable expectation of privacy that [he] might have had" and that therefore petitioner had "impliedly consented to the search." *Id.* at 30.

The court noted that, along petitioner's regular commuting route, the base was prominently marked as a restricted military installation by fences with steel posts and barbed wire, as well as signs on the fences and along the road. Pet. App. 26-27. Just before the gate where the incident occurred, which was located "well inside the perimeter" of the base, a larger sign announced the same warning as the warning on the fences: "It is unlawful to enter this area without permission of the Installation Commander," and "[w]hile on this installation all personnel and the property under their control are subject to search." *Id.* at 27. All guard gates at the base were staffed at all times with uniformed and armed Air Force security personnel, and "[t]he configuration of the guard gate clearly would have suggested to any reasonable individual that it was a secured entrance." *Ibid.* Moreover, FAA employees, such as petitioner, had been informed at their orientation that they and their vehicles were subject to search at any time while on, entering, or leaving the base. *Id.* at 27-28. Finally, the court concluded that respondents would not be liable for damages in any event, because there was no genuine issue of fact as to

whether petitioner sustained any damages as a result of the alleged actions; "[h]e did not." *Id.* at 30.[5]

5. The court of appeals affirmed. Pet. App. 1-5. The court held that all of petitioner's claims (apart from the original *Bivens* claims) were barred because they "were either already litigated, or should have been raised in [petitioner's] original Complaint." *Id.* at 3.[6] With respect to petitioner's Fourth Amendment *Bivens* claims, the court held that, based on the uncontroverted facts, the district court "did not err in concluding that [petitioner] impliedly consented to the search" in light of the many warnings he had received via posted signs and the notice given to FAA employees that personnel and vehicles entering the base were subject to search. *Id.* at 4-5.[7]

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[5] The district court also granted judgment in favor of the United States in the FTCA case. The court first held that petitioner's FTCA claim was barred by the exclusivity provision of the Federal Employees' Compensation Act, 5 U.S.C. 8116(c). See Amended Order of Feb. 27, 2004, at 1-2 (Docket Entry No. 53), No. CV 03-2372 (C.D. Cal.). The court also held that the FTCA claim would be barred in any event by "the law of mandate and res judicata." *Id.* at 2.

[6] The court of appeals affirmed the judgment in the United States' favor in the FTCA action for similar reasons. The court of appeals noted that petitioner had attempted to assert that claim in the prior appeal of the constitutional tort case and that, at that time, the court of appeals had "ruled that [petitioner] had waived that claim because [he] failed to properly present it before the district court." Pet. App. 3. Petitioner does not seek this Court's review with respect to the FTCA action.

[7] The court of appeals also held that the district court did not abuse its discretion in denying further extensions of discovery, "given that the *Bivens* action was filed in May 2000, and [petitioner] had more than sufficient time to conduct discovery," Pet. App. 2, and because he "provided only conclusory and speculative statements" in support of his Rule 56(f) motion, *id.* at 4 n.1.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is therefore unwarranted.

1. a. Petitioner's first question presented, regarding a party's right to amend his complaint once as of right prior to the filing of an answer (Pet. 12-23), asks the Court to resolve a question that was rendered moot by the district court's order granting petitioner leave to file the very complaint that he maintains he should have been allowed to file as of right. As petitioner notes (Pet. 6-7), his first attempt to file an amended complaint was rejected because the court of appeals' mandate had not yet issued, and his second attempt was rejected because the court had not granted leave to amend. See Pet. App. 42-43, 47-48, 49-50; Docket Entry Nos. 44, 47, 53, 55, No. CV 00-5221 (C.D. Cal.). Subsequently, however, the district court did grant petitioner leave to file his amended complaint. See Pet. App. 40-41. The court found that "justice requires granting the motion." *Id.* at 41. Because petitioner was ultimately permitted to amend his complaint, the question upon which he seeks this Court's review—whether the amendment should have been permitted as of right, rather than by motion and leave of court—is moot.

Notably, the court of appeals's decision does not address Rule 15(a) of the Federal Rules of Civil Procedure. Indeed, Rule 15 is not even mentioned in the court of appeals' opinion.[8] Petitioner instead asks the Court to re-

[8] Rule 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served" or "by leave of the court." Fed. R. Civ. P. 15(a).

view the court of appeals' construction of Rule 15(a) as reflected in *other* decisions by the Ninth Circuit. See Pet. 13-14.[9] Review on the first question presented is therefore unwarranted.

b. Petitioner contends (Pet. 17-21) that there is a conflict among the circuits concerning whether dismissal of a complaint that does not terminate the action cuts off a party's right to amend a pleading. Even if this case concerned Rule 15(a), which it does not, it would still not be a proper vehicle for resolving the purported circuit conflict identified by petitioner. Petitioner maintains that the Ninth Circuit "*does not* cutoff the right [to amend] after dismissal for failure to state a claim, * * * after summary judgment, * * * [or] after losing an appeal." Pet. 13 (emphasis added; citations omitted). Petitioner contends that, in contrast, "the First, Second, Eight[h] and Tenth Circuits hold that, unless the court expressly grants leave to amend, an order dismissing the complaint is final, terminating plaintiff's right to amend once as a matter of course," Pet. 17, and that the Fifth and Eleventh Circuits hold that "[a]n order dismissing the complaint is not a dismissal of the action unless it also states the right is denied or otherwise indicates no amendment is possible," Pet. 18. If anything, the Ninth Circuit's rule, as interpreted by petitioner, is *more favorable* to petitioner than the rules of the other courts with which the court below is in alleged conflict. Moreover,

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[9] Contrary to petitioner's repeated representations (Pet. 9, 13, 14, 16), the decision below does not mention *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), much less "interpret" it; nor does it cite any other case interpreting Rule 15. And, again contrary to petitioner's contention (Pet. 20), the court's only reference to "discretion" was its holding that the district court did not abuse its discretion in refusing petitioner's second and third requests to extend *discovery*. See Pet. App. 2, 4 n.1.

the district court order in this case specifically stated that its dismissal was "with prejudice," Pet. App. 57, because "[i]t does not appear that plaintiff could state a claim upon which relief could be granted if allowed to amend," *ibid.* Thus, petitioner would not benefit from adoption of one of the rules applied in the other circuits he discusses, because even under those rules it appears that petitioner's right to amend his complaint as of right was terminated by the district court's entry of a dismissal with prejudice, which the court of appeals affirmed "in every respect, except with regard to the court's dismissal of the *Bivens* claim." *Id.* at 17.

c. Although petitioner criticizes (Pet. 15-16) the court of appeals' holding that petitioner's newly asserted claims were barred by the doctrine of res judicata, he does not present any such issue as a question presented for review. See Pet. i. The court of appeals was, in any event, correct to affirm the dismissal of all claims in the amended complaint (except for the *Bivens* unreasonable search claim) as precluded by the district court's earlier judgment of dismissal and the court of appeals' own affirmance (with a narrow exception) of that dismissal.

The court of appeals held that the new claims "were all barred by res judicata." Pet. App. 3. The doctrine of "res judicata" prescribes the "preclusive effects of former adjudication" on issues or claims raised in a subsequent suit. *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 & n.1 (1984). Although the phrase "res judicata" is generally used with respect to the preclusive effect of a final judgment on a subsequent action, see, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979), similar preclusion principles govern subsequent stages of the *same* litigation, pursuant to the doctrine of law of the case and its corollary, the mandate

rule. See *Arizona* v. *California*, 460 U.S. 605, 618 (1983) ("As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same litigation."); *Fuhrman* v. *Dretke*, 442 F.3d 893, 896-897 (5th Cir. 2006) ("The mandate rule is a corollary of the law of the case doctrine providing 'that a lower court on remand must implement both the letter and the spirit of the [appellate court's] mandate, and may not disregard the explicit directives of that court.") (quoting *United States* v. *Becerra*, 155 F.3d 740, 753 (5th Cir. 1998)) (internal quotation marks omitted).

The district court properly concluded that those principles of finality barred it from considering "all claims in the first amended complaint, except the *Bivens* claim the Ninth Circuit remanded," Pet. App. 29, and the court of appeals properly affirmed on that basis, *id.* at 3. See *Henderson* v. *Stalder*, 407 F.3d 351, 354 (5th Cir. 2005) (court of appeals' "narrow" remand order permitting plaintiff to amend her complaint to add a facial challenge to a government program "was not an invitation for [plaintiff] to add new claims or rationales for [another party's] standing"), cert. denied, 126 S. Ct. 2967 (2006).[10] Accordingly, the dismissal of petitioner's non-*Bivens* claims on grounds of preclusion presents no issue warranting this Court's review.

2. Petitioner's second question presented (Pet. i), like his first, is not genuinely presented by the decision of the court of appeals. Whereas petitioner asks this

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[10] Petitioner does not contend that the court of appeals' use of the terminology of "res judicata" rather than the arguably more precise language of "law of mandate" and "law of the case" that the district court used, Pet. App. 29, warrants this Court's review.

Court to review the question whether "'military bases' are exempt from the probable cause requirement of the Fourth Amendment," *ibid.*, see also Pet. 12, 24, the court of appeals, in fact, expressly rejected such a rule, Pet. App. 15. On the prior appeal, the court of appeals held that the district court had gone "too far in allowing a categorical exception to the probable cause rule for all searches on closed military bases." *Ibid.* Rather, the court held, "the probable cause requirement is only obviated if the [petitioner] impliedly consented to the search." *Ibid.*[11]

Consistent with the decisions of two other circuits, the court of appeals directed the district court to consider the totality of the circumstances under which the search occurred to determine whether consent was implied by the nature of the facility and the location of the search. Pet. App. 12-14; see *United States* v. *Ellis*, 547 F.2d 863, 866-867 (5th Cir. 1977) (entry on Naval Air Station using vehicle pass that notified user that his person and vehicle were subject to search on station premises constituted implied consent to search); *United States* v. *Jenkins*, 986 F.2d 76, 79 (4th Cir. 1993) ("Consent is implied by the 'totality of all the circumstances,'" such as "[t]he barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common-sense awareness of the nature of a military base.").

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[11] The language petitioner relies upon for his characterization of the court of appeals' holding (Pet. 24) is a passage in the court's decision in which it describes, and quotes from, the Fourth Circuit's opinion in *United States* v. *Jenkins*, 986 F.2d 76, 78 (1993). See Pet. App. 13. Although the opinion below later states that the court "join[s] the Fourth Circuit," it specifies that it does so only to the extent that the Fourth Circuit "hold[s] that a person may impliedly consent to a search on a military base." *Id.* at 14.

On appeal after remand, the court of appeals did, in fact, apply a totality of the circumstances approach. The court emphasized that petitioner had been transferred to the base the year before the incident and that his commute took him past the property line marked with steel posts, barbed wire, and signs warning that persons and property on the installation were subject to search, that a similar sign was posted at the gate where petitioner entered, and that FAA employees such as petitioner were advised of the fact that he and his vehicle were subject to search when on, entering, or leaving the base. Pet. App. 4-5.

Petitioner contends (Pet. 25-26) that the court of appeals' finding of implied consent was erroneous on the facts of this case because, he maintains, the search took place "outside of the 'Installation'" (Pet. 10), on a highway that is "open to the public" (Pet. 26). However, petitioner cites no evidence in the summary judgment record to contradict the district court's conclusions that "the guard gate where the incident occurred" was located "well inside the perimeter of Edwards AFB in a desolate area," and that "[t]he configuration of the guard gate clearly would have suggested to any reasonable individual that it was a secured entrance." Pet. App. 27 ¶¶ 15, 16.

Petitioner (Pet. 25) also argues that any implied consent was vitiated by his express refusal to consent to the search when asked at the gate by the guard. But petitioner's expressed reason for not consenting to a search was that he would be late for work (Pet. App. 8), indicating that he did not immediately intend to leave the base premises. Moreover, petitioner thereafter voluntarily exited his vehicle and approached the guard shack, leaving his vehicle at the entrance. The court of appeals'

finding that the totality of the circumstances demonstrated implied consent to the search is therefore correct. Even if it were not, that fact-bound determination would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2006

(3)

No. 06-87

FILED
OCT 31 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

GREG ALAN MORGAN,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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ARGUMENT IN REPLY TO OPPOSITION

Respondents' brief in opposition (Opp.) consists almost entirely of an effort to recast the issues in this case. The two issues currently before this Court are questions of law; hence, the trial court's facts, the facts repeated by Respondents are not facts in any sense of the word, but are judicially created by the trial court and are largely irrelevant. Respondents nevertheless devote a substantial portion of their opposition to the supposed "facts" of this case, "facts" which in reality are merely a collection of *allegations* extracted from the original complaint, the amendment of which is at issue. These allegations are not only irrelevant as a matter of *law*; they are profoundly inaccurate as a matter of *fact*.

FIRST QUESTION

Respondents cannot and do not dispute this exceedingly important issue presented to this Court. Respondents barely touch the issue as presented by petitioner but rather recast the issue[1] more to their hearts' desire, then wrongly assert that this case is not the "proper vehicle" for

[1] Petitioner presented this question as: "Whether the court of appeals erred in concluding that this Court's decision in *Foman* v. *Davis*, 371 U.S. 178 (1962) grants courts discretion to deny an amendment asserted under the first sentence of Fed.R.Civ.P. 15(a)?" and Respondents recast the question as: "Whether the court of appeals properly held that its prior ruling affirming the dismissal of all but one claim, and remanding only that claim for further development of the factual record, precludes petitioner's attempt to relitigate the dismissed claims or to raise new claims that could have been raised in the original complaint." Pet. i and Opp. I.

such resolution and do so upon multifarious circularities. Opp. 10.

Respondents concede the trial court denied petitioner his right to amend upon its "dismissal * * * 'with prejudice'" as well as every subsequent effort, yet argue, the issue was "rendered moot" because petitioner was "ultimately permitted" by leave of the "district court's order" to amend. Respondents' conflicting assertions are contrary to the express terms of the first sentence of Fed. R. Civ. P. 15(a) which provides a party's right to amend "once"; not by "leave," but at "any time," chosen by a party[2] and not by the trial court. Opp. 9.

Respondents concede that the Ninth Circuit "affirmed [the trial court's dismissal] in every respect," which included the denial of the right to amend the complaint, yet argue that the "decision does not address Rule 15(a)." Opp. 9. Respondents' conflicting assertions are contrary to their statements acknowledging that the trial court denied the right "with prejudice," the Ninth Circuit "affirmed" that denial "in every respect," then upon remand; the trial court struck the amended complaint; then granted an amendment; struck that amendment then "ultimately permitted" an amendment and then declared the amendment void as precluded by mandate, the law of the case and *res judicata*. Pet. App. 29 ¶¶ 3-4. On appeal again, the Ninth Circuit declared the amended complaint was barred by *res judicata* even though this action is an unbroken single numbered ongoing lawsuit. All of which occurred

[2] Petitioner raised the issue at every stage of the litigation below and the issue was argued extensively in the trial court and in the Ninth Circuit.

because of petitioner's efforts to enforce his right pursuant to the first sentence of Rule 15(a). Opp. 10.

Respondents concede that "petitioner's right to amend his complaint as of right was terminated" by the trial court yet argue, the "Ninth Circuit's rule * * * is *more favorable* to petitioner than the rules of the other courts."[3] Opp. 10, emphasis in original. Respondents' conflicting assertions are contrary to the express terms of Rule 15(a)'s first sentence and the statement of this Court in *Mayle* v. *Felix*, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (*Mayle-Felix*) which rejected the notion that a trial court possesses the discretion to override "a pleader's right to amend without leave of court."[4] *Id.* at 2574.

Respondents concede that "'res judicata' is generally used * * * on a subsequent action * * * " and the Ninth Circuit erred in applying it to this case, yet argue that the law of the case prevents the petitioner from amending his complaint as a matter of right under the first sentence of the rule. Opp. 11. Respondents' conflicting assertions are contrary to Rule 15(a). The doctrine of the law of the case is not inflexible. It is a doctrine of convenience and utility.

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[3] Respondents posit that half a right is better than none.

[4] Respondents' assertion that "petitioner would not benefit from adoption of one of the rules applied in the other circuits" is accurate, however, irrelevant to the issue. Petitioner rather embraces the first sentence of Rule 15(a) and this Court's statement in *Mayle-Felix* demonstrating the various circuits amendment policies as evolved since *Foman-Davis*'s second sentence Rule 15(a) determination differ materially on the precise meaning of the rule and particular to this action, the Ninth Circuit's discretionary policy granting a trial court the power to deny the right. Where a party has the right to file an amendment as a matter of course, under the plain language of Rule 15(a), the courts lack discretion to reject an amendment based upon any apprehended futility.

The doctrine yields to the law and to reason. The Federal Rules of Civil Procedure are part of and integrated into the law of the case. The doctrine yields to Rule 15(a). Petitioner had an absolute right to cure the defects by an amendment and at a time meaningful "to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

SECOND QUESTION

Again, Respondents recast the issue[5] more to their hearts' desire, then wrongly assert the trial court's "fact-bound determination would not warrant this Court's review" which in reality are merely a collection of *allegations* extracted from the original complaint, the amendment of which is at issue.

Respondents have provided no persuasive contrary argument or identified any compelling government interest as to why this Court's existing Fourth Amendment administrative jurisprudence should not apply to this issue. Again, the purpose of these administrative stops serves two principle objectives; the first is to prevent undesirables from entering the *Installation,* and the

[5] Petitioner presented this question as: "Whether the court of appeals erred in holding that "military bases" are exempt from the probable cause requirement of Fourth Amendment of the United States Constitution?" and Respondents recast the question as: "Whether petitioner, by driving into the guarded entry gate area of a closed military base, after having been warned by signs and by his superiors that he and his vehicle would be subject to search when on or entering the base, impliedly consented to the search of his vehicle." Pet. i and Opp. I.

second is to create the opportunity to initiate a consent search with the stated goal of keeping drugs away from the *Installation*. See Pet. App. 70-72.

At least one federal court has applied the test announced in *Brown* v. *Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979) (*Brown*) to these "administrative searches." Building upon the *state court judgment in this case* (Pet. App. 59-60), the court in *United States* v. *Charrington*, 285 F. Supp. 2d 1063 (S.D. Ohio 2003) (*Charrington*) rejected the Ninth Circuit's "implied consent rationale" announced here upon recognition of the flaws in the first opinion. See Pet. App. 6-15. The defendant in *Charrington* was arrested and charged with possession of marijuana outside of an *Installation* entry gate.[6]

Applying the three-part *Brown* test, the *Charrington* court firstly held that "implied consent" cannot justify a "prolonged detention" like the instant case, more than 30 minutes. The *Charrington* court secondly stated that "*the decision* [here] *purported to follow Jenkins and Ellis, but those cases were inapposite* upon recognition that both defendants in *United States* v. *Jenkins*, 986 F.2d 76 (4th Cir. 1993) (*Jenkins*) and *United States* v. *Ellis*, 547 F.2d 863 (5th Cir. 1977) were *inside the Installation*. The *Charrington* court thirdly analyzed the policy implementing these "administrative searches" granting deference to the policy, however, finding that the policy was substantially violated; thus infringing the Fourth Amendment. See *Charrington*, 285 F. Supp. 2d at fn. 3. Respondents argue and advocate precisely the opposite result determined by

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[6] Possession of such was criminal, whereas petitioner's unloaded handgun was not and petitioner was as well a member of the base sponsored gun club and shooting ranges.

the *Charrington* court which followed *Brown*. See *Charrington*, 285 F. Supp. 2d at 1067.

Notably absent from the trial court's implementation of the concept of "implied consent," the Ninth Circuit's affirmation of that result and Respondents' argument is any evaluation, let alone consideration, of the Air Force's policy effecting these administrative searches. These administrative searches would be consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51. The linchpin of Respondents' argument is the trial court's constricted "totality of the circumstances" view, ultimately extracted from *Jenkins*, placing exclusive reliance upon contested visual indicia to sustain its summary adjudication without consideration of the Air Force's policy.[7] "The configuration of the guard gate clearly would have suggested to any *reasonable individual* that it was a secured entrance." Opp. 14 and Pet. App. 27 ¶ 16, emphasis added.

The Ninth Circuit not only embraced this concept of imagery to vitiate the Fourth Amendment but substantially expanded upon it, by enveloping areas outside of the *Installation*, not secured and contrary to this Court's holding in *Flower* v. *United States*, 407 U.S. 197, 198 (1972), as well as *Greer* v. *Spock*, 424 U.S. 828, 835 (1976).[8]

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[7] Respondents erroneously declare the existence of a "summary judgment record" when in fact the trial court entered summary adjudication. Opp. 14.

[8] Respondents wrongly assert that the record below does not contain references to the status of the highway open to the public. Opp. 14. Petitioner supplied both the trial court and the Ninth Circuit with copies of the Base Newspaper quoting Base Law Enforcement Officials declaring the status of the highway. This was one of the objects of petitioner's request for judicial notice, denied. Pet. fn. 10.

This concept of imagery as the end all for "implied consent" turns the Fourth Amendment on its head – it eliminates the test of whether actions taken by the government were reasonable[9] and grants the government an unfettered right to arrest, search and seize so long as the proscribed visual indicia's are present at a given location, e.g., an unequivocal "welcome sign."

Respondents' *characterization* of petitioner's anticipated awareness of an unequivocal "welcome sign" bears scant resemblance to reality, or to the facts in this case, but rather represents an inflated portrayal of one side's assertions, not tested by what should have been the operative complaint – the first amended complaint. Importantly, Respondents' *characterization* does not diminish the need to resolve the important Fourth Amendment question, but rather amplifies the need.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] The trial court confused the standard of "reasonableness" with "privacy" and placed the entire burden of the existence or non-existence of "implied consent" upon, e.g., a traveler who by happenstance crosses a federal property line dominated by an unequivocal "welcome sign."